PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~743~~ 44

BILLY FERGUSON, APPELLANT,

vs.

GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED OCTOBER 27, 1959

PROBABLE JURISDICTION NOTED FEBRUARY 29, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~147~~ 44

BILLY FERGUSON, APPELLANT,

vs.

GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

[fol. 1]

IN THE SUPERIOR COURT OF DOUGLAS COUNTY, STATE OF GEORGIA

Bill of Exceptions—Filed February 25, 1959

Georgia, Douglas County:

Be it remembered that on the 23rd day of September, 1958, at the regular September term of the Superior Court of Douglas County, before the Honorable W. A. Foster, Junior, then and there presiding, and a jury, there came on for trial the case of the State of Georgia against Billy Ferguson, the same being a bill of indictment wherein the said Billy Ferguson was charged with the offense of murder.

The said case proceeded to trial and after evidence had been introduced and both sides closed, the jury on the 24th day of September, 1958, returned a verdict finding the said Billy Ferguson guilty of murder, without a recommendation of mercy.

Be it further remembered that said defendant in regular course and within the time prescribed by law filed his motion for a new trial and his amended motion, the brief of evidence and transcript of the charge of the Court in said case, all of which was approved and certified by the Judge, and said motion for new trial as amended was duly and regularly heard and arguments submitted until the 3rd day of February, 1959, when and whereupon on said date, February 3rd, 1959, the said Judge overruled said motion for new trial as amended, to which said judgment of the Court overruling said motion for new trial as amended, the said Billy Ferguson, then and there excepted, now excepts, and assigns the same error as being contrary to law and avers that the Court erred in overruling such motion for new trial as amended on each and every ground therein stated.

Billy Ferguson, defendant in the trial of said case, names himself as Plaintiff in Error in this his Bill of Exceptions, and names the State of Georgia as Defendant in Error.

And now comes Plaintiff in Error on this 25 day of February, 1959, and within the time prescribed by law,

presents to the Honorable W. A. Foster, Junior, Judge of the said Court, who presided in said case, this his Bill of Exceptions, and asks that the said exceptions be signed and certified in order that said case may be carried to the Supreme Court of Georgia, in order that the errors com- [fol. 2] plained of may be considered and corrected.

Plaintiff in Error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. The indictment numbered 4264, together with all the entries there on, with plea of not guilty and the verdict of the jury.

2. The motion for new trial with amendment thereto and all entries and orders thereon, with order overruling said motion as amended, dated February 3rd, 1959.

3. The brief of evidence and approval thereof by the Honorable W. A. Foster, Junior, together with all entries thereon.

4. The charge of the Court with all entries thereon.

5. The sentence of the Court pronounced and entered September 24th, 1958.

The Supreme Court of Georgia has jurisdiction in this case of a capital felony (Constitution of Georgia, 1945, Article VI, Section 11).

Plaintiff in Error most respectfully submits this his Bill of Exceptions.

(Signed) Paul James Maxwell, Attorney for Plaintiff in Error.

P. O. Address: 506 Atlanta Federal Savings Bldg., Atlanta 3, Georgia.

[fol 3] CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

I do certify that the foregoing Bill of Exceptions was tendered to me on the 25th day of February, 1959, and that same is true and specifies all the material necessary to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Douglas County is hereby ordered to make out a complete copy of such parts of the record in said case as are in the Bill of Exceptions specified, and certify same as such, and cause the same to be transmitted to the Supreme Court of Georgia, that the errors complained of may be considered and corrected. This 25th day of February, 1959.

(Signed) W. A. Foster, Jr., Judge, S. C. T. C.

The within and foregoing Bill of Exceptions has been exhibited to me before presentation to the Judge for certification, and I have examined the same and have no objections to the signing thereof. I waive my presence at the presentation and signing of the certificate on said Bill of Exceptions.

This 25 day of February, 1959.

(Signed) Dan Winn, Solicitor-General T. C., Counsel for Defendant in Error.

[File endorsement omitted.]

[fol. 4] CLERK'S CERTIFICATE TO BILL OF EXCEPTIONS

(Omitted in printing)

Original Bill of Exceptions, Filed in office March 9, 1959. (Signed) Henry H. Cobb, Deputy Clerk, Supreme Court of Georgia.

ACKNOWLEDGMENT OF SERVICE

(Omitted in printing)

[fol. 5] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

INDICTMENT

The Grand Jurors, selected, chosen and sworn for said County, to-wit:

1. Mac C. Abercrombie, Jr., Foreman
2. W. W. Yates
3. E. B. McIntosh
4. A. S. Mozley
5. Preston Pilgrom
6. J. C. Bomar
7. W. T. Brown
8. H. L. Phillips
9. J. O. Vaughn
10. V. V. Chapman
11. D. H. Warrington
12. Earl H. Payne
13. L. S. Hallman
14. J. W. Rice
15. Tryus C. Kent
16. W. H. Pitts, Jr.
17. E. R. Leake
18. J. E. Seagers
19. J. G. Parish
20. J. W. Shadix Sr.
21. T. Clayton Webb
22. J. M. Wilson
23. Ted Umphrey

In the name and behalf of the citizens of Georgia, charge and accuse Billy Ferguson, hereinafter referred to as the accused, of the County and State aforesaid with the offense of Murder, for that accused on the 17th day of July, in the year of our Lord Nineteen Hundred and Fifty-eight, in this County aforesaid, did then and there, unlawfully and with force and arms: did wrongfully, unlawfully, feloniously, and with malice aforethought, kill and murder Luke A. Brown, by shooting him, the said Luke A. Brown, with a certain pistol and gun, a further description of said pistol and gun being to this Grand Jury unknown, contrary to the laws of said State, the good order, peace and dignity thereof.

———, Prosecutor. Robert J. Noland, Solicitor General.

Douglas Superior Court, September Term, 1958.

Special Presentment.

[fol. 6] ENTRIES ON BILL OF INDICTMENT

D.P. No. 274

Case No. 4264

Douglas Superior Court

September Term, 1958

THE STATE

vs.

BILLY FERGUSON

(Murder)

True Bill

Mac C. Abercrombie Jr. Foreman
Robert J. Noland, Solicitor General

Returned in open court by Grand Jury, this 15th day of September, 1958.

F. M. Winn, Clerk.

SPECIAL PRESENTMENT

Witnesses for the State

James Rainwater	Bobby Jackson
J. B. Cooper	Mrs. Shirley Truiett
Mrs. A. W. McLarty	Billy Jackson
Helen Graham Cohran	Kenneth A. Miller.
J. D. Gaston	Mrs. Luke A. Brown
Mrs. Guy Astin	Jessie Thompson
T. A. Smith	Vincent Henderson
H. R. Huckeba	Frank Grainger
Dr. C. V. VanSant, Jr.	J. C. Hicks
Dr. Larry B. Howard	

The defendant, Billy Ferguson, waives copy of Indictment and list of witnesses, also waives being formally arraigned and pleads not guilty.

Robert J. Noland, Solicitor General. Paul James Maxwell, Defendant's Attorney.

September 23, 1958.

IN THE SUPERIOR COURT OF DOUGLAS COUNTY

VERDICT—SEPTEMBER 25, 1958

We the jury find the defendant guilty. This the 25th day of September, 1958.

W. R. Kilgore, Foreman.

[fol. 7] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

MOTION FOR NEW TRIAL—Filed October 10, 1958

[Title omitted]

Verdict and judgment for State at September term, 1958, of Douglas Superior Court, on 24th day of September, 1958.

The Defendant being dissatisfied with the verdict and judgment in said case, comes during said term of court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds, to-wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of the evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon Defendant prays that these General grounds for a new trial, be inquired of by the court; and that a new trial be granted.

Paul James Maxwell, Attorney for Defendant.

ORDER TO SHOW CAUSE AND SUPERSEDEAS—October 10, 1958

The foregoing motion read and considered. Let the motion be filed, served upon Counsel for State and let the State show cause before me at such time and place as may be fixed by the Court for hearing motions for the Sept. Term, 1958, why the motion should not be granted. Let this order act as a supersedeas until further order of Court. In the meantime and until the final hearing of said Motion,

whenever the same may be had, Movant is allowed to amend and perfect the motion, and to prepare, present for approval, and file the brief of evidence in said case.

This 10th day of October, 1958.

W. A. Foster, Jr., Judge Sup. Court Tal. Circuit.

[fol. 8] [File endorsement omitted]

ACKNOWLEDGMENT OF SERVICE

(Omitted in printing)

[fol. 9] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

[Title omitted]

AMENDMENT TO THE ORIGINAL MOTION FOR A NEW TRIAL—

Comes now Billy Ferguson, movant in the original motion for a new trial filed on October 10, 1958, in the above stated case, with leave of the Court, and amends said original motion for new trial by adding the following, To Wit:

Ground One

Because the Court erred in admitting in evidence, over objection of movant, one certain U.S. pistol revolver, break-back, type, with number 68123, same being the alleged murder weapon.

Movant contends that the admission of the said revolver in evidence was error because there was no evidence or testimony that positively identified said weapon as being the gun from which was fired the fatal bullet; that said admission of evidence was harmful and prejudicial to the defendant.

Ground Two

Because the Court refused to allow movant while on the stand in his own defense to be propounded any questions by counsel for defendant.

Movant shows as a part of said motion that the following colloquy, in the presence of the jury took place:

Billy Ferguson, called to the witness stand by Mr. Maxwell:

Q. Your name is Billy Ferguson?
A. Yes, sir.
Q. Let me ask you, have you murdered anybody?

Sol. Gen.: That is highly irregular and improper. There is no authority for counsel questioning the witness.

Mr. Maxwell: There are numerous cases that the courts of Georgia have held that counsel has no right to ask the [fol. 10] defendant any questions on the stand, and it is my contention that that is unconstitutional, on the ground that it violates the defendant's rights under Secion 2-105 of the Georgia Constitution, and that it further violates the Constitution of the United States. Article VI provides that the accused shall enjoy the right to have the assistance of counsel for his defense. It is a violation further of the Fourteenth Amendment to the Constitution of the United States, Article 14, on the ground that it deprives the defendant of the benefit of his counsel asking him questions at the most important period of the trial. This defendant has entered this court and sits here like a mute person. He is now called upon to get on the stand. I might just as well be downstairs or across the street while he is up there. What benefit am I if I can't ask him any questions? Now, if the code Section 30-415 said that he shall not have the right to have his attorney ask him any direct questions, I would agree, but it does not say that, it simply says that he shall not be subject to cross-examination if he desires not to do so. There is nothing about his own lawyer asking him any direct questions.

The Court: However logical your argument may be, I am compelled to hold that you do not have the right to do anything more than instruct your client as to his rights, and that you have no right to question him on direct examination.

Mr. Maxwell: So there can be no mistake about it, I am saying that it is a violation of Section 2-105 of the Georgia Constitution and also is a violation of the Constitution of

the United States, Article Six, and Article 14 of the Constitution of the United States.

The Court: You may proceed.

That counsel then and there excepted to said ruling upon the grounds that same was a violation of Section 2-105 of [fol. 11] the Georgia Constitution and Articles Six and Fourteen of the Constitution of the United States.

That said ruling and said colloquy in the presence of the jury; without the Court upon its own volition having the jury removed from the court room was erroneous and highly prejudicial and harmful to the defendant.

Movant confends:

(a) That said ruling deprived the defendant of his right to full benefit and assistance of counsel.

(b) That said ruling thereby wrongfully deprived defendant of even so much as a timely reminder of assistance from his counsel as to any part of his statement to the jury.

(c) That said ruling and comments by the Court in the presence of the jury tended to and did disparage the defendant's appearance on the stand and further tended to belittle and minimize the aid that could have been rendered to defendant by his counsel, and implanting into the mind of the jury the thought that they might disregard both.

Ground Three

Because the Court erred in adinitting in evidence and permitting the same to be read to the jury the written confession, identified as state's exhibit 20, as follows:

"July 17, 1958.

4:10 P. M. Douglas County Court House Douglasville, Ga., Sheriff's Office. Statement of Billy Ferguson, age 19, birth date Sept. 12, 1838, address 15 Church St., Mrs. McLarty rooming house, Douglasville, Ga.

I Billy Homer Ferguson make this statement of my own free will I have been advised of my rights that I do not have to make a statement of any kind that any statement I do make can be used against me in court. There have been no threats of bodily harm made and no promise of any reward of any kind. This statement is made in the

presence of Dept. Sheriff J. B. Cooper, Chief H. B. [fol. 12] Huckaba, J. C. Hicks, Douglasville, City Police, J. D. Gaston and T. A. Smith, Ga. Bureau of Investigation, on July 17, 1958, at approximately 5:30 A.M. I got up from my in Mrs. McLarty rooming house and went down to the Douglasville Gift Shop located on 78 Highway just east of Douglasville. This gift shop and radio and television repair shop was operated by a fellow I knew as Brown. When I got to his place this morning I had to wait for him to get to the shop. I believe he arrived about 6:30 A.M. Brown was going to repair my radio in my car. He told me to take the radio out of my car and bring it in. He helped me take it out. Before we got the radio out two boys came by, one of them I knew as Billy Jackson, I did not know the other one. They left in about 5 or 10 minutes. After they left Brown helped me take the radio out of my car and took it inside the place. Brown repaired the radio. The two of us put it back in the car. While we were working on putting it in I went inside to get a screwdriver. While in there I saw Brown's gun (pistol) hanging on a nail in the corner of the workshop. I put the pistol in my pocket and went out back to the car and we finished putting the radio in my car. Then we both went into the shop. Brown walked over to the adding machine, he had his back to me. I took his pistol out of my pocket and aimed at him. I shot him in the back. When I shot him he fell on his back. He mumbled something that I couldn't understand. Then I shot him twice more. Then I unzipped the pocket of his overalls and took his bill fold out. I put the gun and bill fold in my pocket, got in my car and drove back to my room at Mrs. McLarty's. I took several ten dollar bills out of the billfold and put them in my pocket. I hid the gun and bill fold with the rest of the money in it in the attic of the closet to my room. I then went to my girl's house, Helen Graham and we then went to see about an apartment at Mrs. Thorgerson's on Rose Avenue. Then we went to Villa Rica to the hospital and had a blood test. We were on the way back to Douglasville and had gotten to White City when Dept. Sheriff Cooper and Chief Huckeba stopped us and brought me to [fol. 13] jail in Douglasville. The gun that was shown me by T. A. Smith is the same gun that I shot Brown with

and the same one that I hid in the attic at Mrs. McLarty's. The bill fold is the same bill fold that I took out of Brown's pocket when I shot him and the same one that I hid in the attic at my room in Mrs. McLarty's rooming house. The above statement is true and correct.

Signed Billy Homer Ferguson.

I have read it.

Witnesses: T. A. Smith, GBI, J. B. Cooper, J. C. Hicks, J. D. Gaston, GBI, H. R. Huckeba".

Movant contends that said "confession" was procured prior to the time of the Grand Jury indictment and before any warrant had issued; that said alleged confession was obtained at a time when defendant was being held in jail by said officers without any legal or formal charge (from July 17 to September 15); movant further contends that the confession obtained while defendant was being held illegally and his right of counsel and formal charge before a competent officer were being violated; that, that therefore made the confession "void." That said ruling was error on the further ground that same was discriminatory; all of which grounds were then and there agued and urged.

Ground Four

Movant asserts that one of the jurors, namely E. H. Rice, a member of said jury returning said verdict was disqualified to serve as a juror. In support thereof movant attaches hereto and makes same a part of this amended motion for new trial two affidavits; one of the defendant and the second of defendant's counsel. Said affidavits show that neither the accused or his counsel had any knowledge that said named juror was related by affinity within the third degree to the solicitor general Robert L. Noland. That as to this newly discovered evidence as to the relationship aforesaid, both counsel and defendant were completely ignorant of same until after trial of said case.

[fol. 14] Ground Five

Movant avers as a matter of fact that one, and possibly more jurors were disqualified to sit on the jury, because unknown to movant or his counsel at the time of their selection, they were biased and prejudiced against defend-

ant. Movant shows that by reason of same he was wrongfully deprived of a fair and impartial trial. Movant attaches hereto as a part of this amended motion for new trial affidavit of Paul James Maxwell, his counsel. Movant specifies as one of the jurors, one Ray Kilgore, foreman of said jury and names as witnesses for the purpose of showing to this honorable court said bias and prejudice the following: Roy Sailors, Claude Mozley, Mrs. Faye H. Estes and Raiford Strickland. Movant asserts and shows to the Court that he has diligently sought to obtain from the above named witnesses affidavits setting forth testimony perfinent and material to this special ground for new trial, and that each witness firmly and positively refused to give the same, stating that they would not testify until required to do so by court authority.

Movant therefore prays that the court take such action and grant such order as will require the witnesses named above and appear and give their testimony to be used by and on behalf of movant on this motion for new trial, and upon this ground thereof, and that a time and place be fixed to which said witnesses shall be subpoenaed to appear and give their testimony and be fully examined in accordance with the law. In addition to the foregoing, movant charges upon information and believe that juror Alfred B. Smith was biased and prejudiced. That Rule Nisi issue by this Honorable Court in accordance with the law.

Wherefore, movant prays that these his additional grounds of motion for new trial, be inquired into by the Court, aproved and allowed, and that a new trial be granted to him.

James Paul Maxwell, Attorney for Movant, 506 Atlanta Fed. Sav. Bldg., Atlanta 3, Georgia.

[fol. 15] Affidavit of Paul James Maxwell, Counsel for Defendant—December 15, 1958

Personally appeared before the undersigned officer duly authorized to administer oaths, Paul James Maxwell, and after jury verdict in said case, and sentence thereon and says: "that he was the attorney representing Billy Fergu-

son in the above stated case at the trial thereon. Prior to the selection of the jury in said case and before the jury verdict I did not know or had no means of knowing that juror E. H. Rice and solicitor general Robert J. Noland were related to each other by affinity within the third degree; nor did I have any opportunity by the exercise of ordinary diligence to have so discerned prior to the rendition of the verdict.

This affidavit is made for the purpose of being attached to the amended motion for new trial.

Paul James Maxwell.

Sworn to and subscribed before me this 15th day of December, 1958. Chaley Harrison, Notary Public. (Notarial Seal.).

[fol. 16] AFFIDAVIT—December 17, 1958

Comes now Paul James Maxwell, who being duly sworn deposes and says: "That I am counsel for defendant, Billy Ferguson. That at about midnight on the final day of his trial, September 24, 1958, in Douglas County Court House, while waiting for the jury to reach its verdict I went out for a walk and some fresh air. At a point right in front of the Court House I was approached by a man who identified himself as Roy Sailors and stated that he, together with other men had heard a juror say that if he was selected to serve on the jury that he would see that the boy (meaning Billy Ferguson) got the chair. Almost immediately I went to the office of the Trial Judge and reported the said conversation to said Trial Judge, the solicitor general, Robert L. Noland, being present at the time. Before we had completed our conversation regarding the same a bailiff came in and told the judge that the jury had now reached a verdict and was ready to report. Whereupon the judge arose and proceeded to the court room. The aforesaid conversation of Mr. Sailors was further investigated by me and same disclosed that Mrs. Faye H. Estes heard from Mr. Claude Mosley a statement made by Ray Kilgore, foreman of the jury, which statement was the same as that made to the affiant by Roy Sailors at

or about midnight of the trial. Another juror, Alfred B. Smith, was said to have made the same remark.

On the night aforesaid said R. Sailors told me that he would give an affidavit or go with me to the judge. When I contacted the said R. Sailors, by telephone within a week later, he stated that he had changed his mind about signing the affidavit due to personal and business reasons, and did not want to get mixed up in same.

Since my attention was called to these evidences being [fol. 17] biased and prejudiced I have diligently sought to ascertain the true facts."

This affidavit is made for the purpose of being attached to and made a part of the amended motion for new trial in the above stated case.

Paul James Maxwell.

Sworn to and subscribed before me, this 17th day of December, 1958. Chaly Harrison, Notary Public. (Notarial Seal.)

[fol. 18] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

[Title omitted]

AFFIDAVIT OF DEFENDANT—December 5, 1958

Personally appeared before the undersigned officer duly authorized to administer oaths, Billy Ferguson, defendant in the above stated case, and after jury verdict in said case and sentence thereon says: "at the time of the trial in my case, and selection of the jury in said case I did not know that juror E. H. Rice and Solicitor General, Bob Noland were related to each other by affinity within the third degree; nor did I have any opportunity by the exercise of ordinary diligence to have so discovered prior to the rendition of the verdict."

This affidavit is made for the purpose of being submitted to the court by and through my counsel.

Billy H. Ferguson.

Sworn to and subscribed before me this 5 day of December, 1958. Chaley Harrison, Notary Public. (Notarial Seal.)

[fol. 19] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

ORDER ON MOTION FOR NEW TRIAL—December 19, 1958

The recital of facts contained in the foregoing action for new trial is hereby approved as true and correct and all the grounds of amendment are approved; and the statement is hereby allowed this 19th day, December, 1958.

W. A. Foster, Jr., Judge S. C. T. C.

ACKNOWLEDGMENT OF SERVICE

(Omitted in printing)

[File endorsement omitted.]

[fol. 20] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

[Title omitted]

ORDER OVERRULING MOTION OF DEFENDANT FOR NEW TRIAL AS AMENDED—February 3, 1959

The above named and stated case having come regularly before the court for hearing upon the defendant's motion for a new trial, as amended, on December 19, 1958 and after hearing evidence submitted thereon and argument of counsel, both parties thereto having requested additional time in which to submit additional evidence and written arguments thereon which was duly granted by the court allowing all parties until January 25, 1959, in which to submit further evidence and argument which has been duly and timely presented for the court's consideration and after review of additional evidence submitted in behalf of both parties, the court finds as a matter of fact, from affidavits of the twelve jurors sworn to try said case, submitted in behalf of the State of Georgia, that the question, "Are you related to the Solicitor or to anyone in his office are anyone around the table?" was not in fact and in truth asked of the said

jurors, either individually or collectively, while said jurors were being examined on voir dire by counsel for the defendant, as asserted by counsel for the defendant in his place, in substantiation of the allegations set forth in Ground Four of the defendant's motion for a New Trial, as amended.

The court further finds as a matter of fact that no juror sworn to try said case was biased or prejudiced against the defendant as contended in Ground Five of the motion for New Trial, as amended, the evidence in substantiation of said contention having failed to show the existence of any such bias or prejudice.

Therefore, after due consideration of evidence submitted on behalf of both the State of Georgia and the Defendant, [fol. 21] and after hearing argument of counsel of both the State of Georgia and the defendant, orally and in writing, it is

Considered, Ordered and Adjudged that the defendant's motion for a new trial, as amended, be and the same is hereby overruled, as to all grounds, and a new trial is hereby denied.

This 3rd day of February, 1959.

W. A. Foster, Jr., J. S. C. T. C.

[fol. 22] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

[Title omitted]

Hon. W. A. Foster, Jr., Presiding

Brief of Evidence—Trial September 23-4, 1958

APPEARANCES:

For the State, Solicitor General Robert J. Noland, Assistant Solicitor General James I. Parker, Eugene B. Brown.
For the Defendant, Paul James Maxwell, A. Kaplan.

Mrs. Luke A. Brown, sworn for the state, testified:

My name is Mrs. Luke A. Brown. I was the wife of Luke A. Brown during his lifetime. As long as I live I won't forget the events occurring on the morning of July 17, 1958. Between 6:45 and 7:30 that morning I was in the living room at my residence. Mr. Brown was in the television repair business, his place of business being located 160 feet from our residence. I could see the shop from my door. I was in the living room, directly in front of the door, ironing. Mr. Brown left the house about 15 minutes to 7 that morning to go to his place of business. I could see the place of business from where I was standing in my living room. After Mr. Brown left I looked and saw him come out of the back door with Billy Ferguson, whom I knew, having seen him several times. I couldn't see the front door. When they came out of the place of business Mr. Brown was motioning toward the building, talking to Ferguson about something, I couldn't hear the conversation. They stayed out there a few minutes and then went back. Not long after that I heard three shots. Before I heard those shots I didn't do anything only just see about a dog goin up the highway, to keep it from getting killed, it scared me. I didn't go to the place of business because I didn't think anything about it at the time. I went up there later, somewhere between 7:45 and 8 o'clock, and found Mr. Brown's body lying on the floor. All this that I have described occurred in Douglas County, Georgia.

Cross-examination.

My husband left somewhere between a quarter to 7 and 7. It was between 7 and 7:30 that I looked out of the window [fol. 23] and saw Mr. Brown and Billy Ferguson. I saw nobody else. There is a back door to my husband's shop. They were talking, Mr. Brown was motioning with his hands, talking to Ferguson. I didn't notice anyone else in the building. From where I was, I could have seen a car come up to the front of my husband's store from one direction, the east. What you exhibit to me is the likeness of the shop in the front, and what you next exhibit to me is the back, looking at it from my house. This (indicating) would be east. If I was looking out of my home and a car pulled out on the Bankhead Highway I could see it going over that edge (indicating), that would be to my right. I don't think I could see it if it came from the other direction until it was right in the door. Looking from my house I could see through the back door and see through the window, but I can't see through the front door. From my home I can see through the window of the shop. As to whether I can look through the window and see who is in the front of the building, I don't know whether I could tell who they were. I didn't see anybody fire any shots, but I heard it. I didn't see anybody shoot a pistol or a gun.

Dr. C. V. Vansant, sworn for the state, testified:

My name is Dr. C. V. Vansant, Junior. I live in Douglasville, Georgia. I graduated from the Medical College of Georgia in 1950. I had two years of post-graduate work at Charity Hospital in New Orleans, and since that time have been practicing in Douglasville, Georgia. Between 8 and 8:30 o'clock on July 17, 1958, in response to a call I went to Luke Brown's place of business on Bankhead Highway on the east side of Douglasville. When I arrived there I found Mr. Brown on the floor of the store, dead. I examine the body at that time. It was removed from there at my direction and taken to the James Coxan Whitley home. At that place I made a complete examination of the body, without clothing. I found three wounds on his person, the locations of which I now point out on your body. One was in the mid portion of the back I imagine three or

four inches below the shoulder blade, one on the right side of his head, and on the temple, it penetrated the skull, and one on the left temple. That shot penetrated the skull and [fol. 24] the brain. Only one shot, the one in the right temple, came out, the other two remained in the body. The bullet wounds were probed and investigated, and the bullet which had entered the back was removed for identification purposes, and X-rays of the body were taken before any of this was done, the location and the path and the position of the bullets that remained in the body. I autopsied the body. From the results of that autopsy, the bullet that entered the mid portion of the back was recovered in the right peltic region, near the hip joint, in the posterior aspect or rear of the body, below the point of entrance into the body. I made an examination to determine the course of the bullet that entered the left temple. It went straight into the brain; we have X-rays. I can identify state's exhibits 14, 15, 16 and 17. I was present when those films were exposed and shot. They correctly portray the facts as I found them that morning when I examined the body.

State's exhibits 14, 15, 16 and 17 admitted without objection.

Exhibit 16 was an AP view of the skull of Mr. Brown, the film that has been identified showing a foreign body in the substance of the brain, it shows fragments in the path of the bullet. The course of the bullet was as I now illustrate. Exhibit 14 is a lateral view of the same person, showing the approximate path of the bullet. You can't show it exactly, but you go by the fragments which more or less indicate the path that the bullet took. A bullet or any other metallic object hitting the skull, of course it doesn't go in a straight direction in which it entered the skull, it ends up almost anywhere, but you go by the fragments, so approximately the bullet came in this side and ended up here (indicating). This bullet was never removed, it is all in fragments. You have to have two views to tell where the bullet ended up. It ended up approximately in the center of the brain. You can't tell there (indicating) what part of the brain it was, but from this view you can tell it is almost in the mid line there. State's exhibit No. 15 is the pelvic bone, the bullet was on the right side of the

pelvis, close to the hip joint. This bullet was removed intact. I examined his body in the spinal region at the [fol. 25] point of entrance. The condition of the body there shows evidence of the path of a bullet, and I am sure from following examination that that's what deflected the bullet. That was the bullet that was recovered by me. State's exhibit No. 17 is a lateral view of the same person showing the posiiton of the bullet there in relationship to the body. The cause of death of Luke Brown was multiple gunshot wounds, one of which entered the brain, which would have caused death instantaneously on entering the brain. From the X-rays, the bullet was fired on the right side of the head. The bullet in the mid portion of the back entered from the back. State's exhibits Nos. 1, 4, 6, 8, and 11 I can identify as being true and correct representation of the facts that they purport to show.

Cross-examination.

I have been practicing since 1952. I don't remember offhand how many murder cases I have had experience with, how many people dying of gunshot or bullet or pistol wounds, I would say five or six. I don't remember the last occasion that I had to examine bullet wounds in the skull. I did not remove the bullet out of the skull. You ask how, looking at the X-ray, I know that is a bullet. It is due to the fact that there was a bullet wound, it was caused by a bullet, that is a presumption on my part. How I know the little fragments are fragments of that bullet, I know it due to the characteristic way they look on X-rays. If this man had been struck on the head a year or five years ago with something metal, as to whether that would show up in the X-ray, he wouldn't be alive if he had anything where these X-rays show. There was no evidence of any blow to the head at all other than the gunshot wounds, there were two holes in the head. You ask if there were two bullets left in the head, and the other bullet that I got out. The other bullet was lying by the side of the body. How I know that bullet came out of his head, it went through the skull and hit something, I just assume that it went through the skull. I am not saying of my own knowledge that the bullet that was lying on the floor went in his head.

[fol. 26] As far as I am concerned, the other bullet that I say was in his head is still in his head. It has never been removed. I don't know what caliber gun caused these bullet holes. There is no way of knowing whether the same gun was used. I couldn't tell whether he was shot with two different guns or with the same gun.

FRANK GRANGER, sworn for the state, testified:

I am Frank J. Granger. I live in Douglasville. I am employed at the Douglas County Memorial Hospital as X-ray and laboratory technician and have been so employed ten years. As to my training to perform these functions, I have been since 1955 registered with the American Society of X-ray Technicians. I exposed and developed the X-ray films which you exhibit to me as state's exhibits 14, 15, 16 and 17. I was present at the Douglas County Memorial Hospital on or about the 17th of July, 1958, on which date I had occasion to examine the body of Luke A. Brown for the situs of any wounds on his body. I took notes from my examination. You ask me to show the jury on your body the location of any wounds that I found on the body of Luke Brown. On the right side of the face there was a wound starting with the eye and running across the cheek and hitting the ear and breaking the cheek bone on the right side and cutting the corner of the ear. On the left side there was a wound in the temple approximately two inches from the eye and two inches from the tip of the ear, and in the left hand this finger, there was a bullet hole through this finger, breaking the bone in this finger, and in the spine, I believe on the left side of the spine, about two centimeters from the center of the spine and I believe 52 or 54 inches from the tip of the heel, I am not positive about the measurements. (Refers to notes.) It was 52 inches, and it was two centimeters to the left of the center of the spine and 62 inches from the tip of the heel to the wound. There are approximately three centimeters to the inch.

Cross-examination.

I am a registered technician at Douglas County Memorial Hospital. I have been there ten years. Before that I worked seven months with Dr. Taylor in his office and

[fol. 27] worked approximately two years at the Whitley Funeral Home in Douglasville, and I took the examination during that time. As to what my duties at the hospital consist of, I am X-ray and laboratory technician. You ask why I volunteered the information about the hand. I didn't volunteer it; he asked me if I saw the wounds and I told him the wounds that I saw. How I determined that the hand wound was from a bullet, there was a hole through the finger. As to whether anything but a bullet would cause that, I don't think anything but a bullet would burn it. I don't know of my own knowledge that it was caused by a bullet, it is my thought. I say it was a bullet, based on having seen bullet holes that I knew were bullet holes. I don't know what caliber gun would make that kind of a hole. Knowing about gun holes, I wouldn't think that more than one gun made those holes. Whether one hole could have been made by one gun and another hole made by another gun I wouldn't know. It is not true that all I know about it is that I took those X-rays; I know I examined the body and I know where the holes were located, and I took those X-rays. I didn't say that as far as I am testifying from my own knowledge I don't what he died from, what caused them.

JAMES RAINWATER, sworn for the state, testified:

My names is James Rainwater. I have been sworn in this case. I am a deputy sheriff of Douglas County and have been since the first of '57. I held that position on or about the 17th of July 1958. On that date I received a call in my capacity as deputy sheriff, I think it was around 8:30, I had just got into the jail and the 'phone rang. In response to that call I went to the TV radio shop of Luke Brown on highway 78, east of Douglasville, where I found the body of Luke Brown lying on the floor. I was the first one that went in, no one else went in with me. Luke Brown was lying right behind the adding machine, and his right foot, or left, I don't remember, he was lying down and his foot was right underneath the adding machine and he fell down about against the cabinet I guess you would call it. He was lying kind of twisted, in a twisted position, [fol. 28] he just fell a little bit on his back, twisted just a little bit. I believe state's exhibit No. 2 correctly por-

trays the facts that it purports to show. It is a true and correct photograph. State's exhibits 3, 5 and 10 are true and correct photographs. These four photographs correctly portray the position of the body and the situs of the wounds at the time I found Luke Brown down there as I have described. After I found the body of Luke Brown down there I continued my investigation of this case and assisted the other officers. The place where I found the body of Luke Brown was in Douglas County, Georgia. Later that day I had occasion to talk with Billy Ferguson in the jail here in Douglasville, some time that morning, I don't know the exact time. He did not make a statement to me at that time. I was not present when he made a statement.

Cross-examination.

I didn't take these photographs. I think Mr. Branham, the newspaper man, took them. I don't know of my own knowledge whether these photographs have been retouched or not, so when the solicitor said was that a true and correct photograph, what I meant was that it was as far as I know. You ask if I know whether anything else was put in here afterwards. According to the picture and what I saw on the floor, no. I didn't take the pictures, I was there when they were taken. The place where he was lying was behind the counter, it was not directly in front of the door, it was maybe a few feet east of the door, behind the counter, the adding machine was lying on the counter and I believe there was another adding machine over there. The front and back door are not directly in line, they are offset I imagine about ten feet. I imagine the body was closer to the center of both doors, actually. It wasn't hardly in line with the back door or the front door. When I went out there I didn't notice any blood stains on the floor from the front door. I looked for them and I didn't see them. I don't believe I saw any blood stains anywhere except as purported to be shown in the photograph. I didn't look from where the body was to the back door. I presume I was the first officer out there. When I got there, there wasn't anybody in the building, [fol. 29] there was some fellow at the service station, and Mrs. Brown was at the service station. The front door was

open, so was the back door. There was nobody running around the building when I got there. Mrs. Brown was not at her home, she was standing between there and the filling station; just about at the filling station; there is a dirt road there and she was about 10 or 15 feet—she was near the gas station, so when I got there there was nobody in the building except the body of Luke Brown. Later, but not at that moment, I examined to see whether the cash register had been rifled. There was some change in the cash register, I don't remember how much, I have got it all in a sack there, there was a little change, I don't believe there was any bills. When I got there I called the doctor and then I called the ambulance, then I called the GBI agent that works in this county and called Mr. Cooper. I didn't touch the body then, I waited till the doctor got there, no one touched it till the doctor got there. He was examined by the doctor. Those pictures were taken after the doctor got there I believe, because I called the newspaper man, I wanted somebody to take some pictures of the way he was lying. The doctor just touched his arm I believe, I don't know whether the right or left, that was all that he did right then. After he examined him and they took the pictures, the doctor told them to remove him to J. Cowan Whitley's I believe it was. I didn't see anybody shoot a gun or pistol out there.

Redirect examination.

When I arrived out there I searched the premises for a gun. I did not find a gun.

State's exhibits 2, 3, 5, 10, 1, 4, 8 and 11 introduced in evidence, without objection.

J. B. Cooper, sworn for the state, testified:

My name is J. B. Cooper. I am deputy sheriff of Douglas County and have been since January 1, 1957. I was so employed on or about the 17th day of July, 1958. On that day I went to Luke Brown's TV radio shop in response to a call, arriving there between 8:30 and 8:45. When I arrived there I found Mr. Brown's body lying on the floor. [fol. 30] In my capacity as an officer I proceeded to investigate for any violation of law. I saw Billy Ferguson

that day, the first time I saw him was between 10 and 11 o'clock I believe in the morning, he was traveling east on highway 78, about White City out here, coming toward Douglasville from Villa Rica. I can identify the bullet that you hand me. I have seen it before; I saw it on the day that Mr. Brown was killed. I first saw it when Denver Gaston handed it to me, Dr. Howard handed it to Denver Gaston and he handed it to me. We put it with the other things. When I first saw that object it was on the floor of Luke Brown's place of business, some three feet from his body, I couldn't say exactly, some short distance. When I saw Billy Ferguson about 10 o'clock on the morning of the 17th of July, headed toward Douglasville, he was in his own automobile, driven by himself. There was a Cohran with him. When I saw him I was riding in my own car, with Chief Huckaby. We met Billy Ferguson in his vehicle and we turned around and caught up with him and blew the siren and he pulled over and we got out and talked to him. I had a conversation with him at that time. He did not make a statement to me at that time. When we pulled over and stopped, we told him to come go back with me, to get in my car and come back with me, we wanted to talk to him. He didn't say anything. Billy and I got in my car and Mr. Huckaby drove his car on back with Mrs. Cohran. I didn't have a conversation with Billy between White City and Douglasville, he didn't ask why we stopped him or anything about it, in fact there was very little said, he didn't ask why we stopped him or anything. I just told him when I stopped him and shook him down that I wanted to talk to him. What I mean by shaking him down, I searched for a knife or a gun or any weapon, like you do anyone when you stop them. We come to the county jail in Douglasville. I believe James Rainwater was there and Denver Gaston. Rainwater and Gaston had a conversation with Billy Ferguson at that time. I was looking through the car, they talked to him at that time more than I did. It was some time later on after we talked to Billy that I arrived back at the jail, I don't know just how long, things happened to fast that I couldn't say exactly what time it was. Somewhere around 4 o'clock that afternoon Billy [fol. 31] Ferguson made a statement to other officers in my presence. The statement was made freely and volun-

tarily. He was not placed in fear of bodily harm from me or anyone else in my presence, nor promised any reward or the hope thereof.

Cross-examination.

The first I heard about what you term this alleged murder, I was called, I had been out most of the night and I was at home shaving when I got the telephone call, around 8:45 in the morning. I drove straight from my house to the TV shop, arriving there four or five minutes later, it isn't far. Eight or ten people were there when I arrived, something like that, practically all of them bystanders rather than people connected with the investigation. You ask if anything was said to me about Billy Ferguson. Yes, Mr. Rainwater, my partner, asked me to go across to the Piedmont shop across the railroad in front of this Brown place and see if Billy Ferguson was over there. How Billy Ferguson's name came up, Mr. Rainwater told me that he was the last one seen around the place, that's why I went to see if I could find him. He talked to a man that told him, and I proceeded to go out looking for him. I went across there, that was where he was working. I didn't find him. Mr. Miller, the foreman, told me he was off until Monday morning, so when I came back across the railroad to Mr. Brown's place of business, Chief Huckaby told me that Billy had gone to Villa Rica for a blood test. That's why I started to Villa Rica to see if I could find him. They did not tell me to look for Billy Ferguson because he was the one that committed the crime; we wanted to talk to everybody that was seen around the place of business. He and two more were seen around the place. The TV shop is east from this courthouse. When I went to the place where Billy worked, somebody told me that he went to Villa Rica, and I proceeded toward Villa Rica to talk to him to see if he could explain where he was at that time, after I came back from the Piedmont shop where he worked, which is across from the TV place. In going to Villa Rica, I went right by this courthouse some 20 or 25 minutes after my arrival at the TV shop at approximately [fol. 32] 8:45, which was approximately 9:05, 9:10 It was during the week, a day of business, the courthouse was presumed to be open. We have a justice of the peace in

this courthouse. I did not stop at that justice of the peace or anywhere else and obtain a warrant of any kind. None of my superiors handed me a warrant or told me that they had a warrant. When I pursued him I had time to stop and obtain a warrant if I wanted to do it. When I first observed the defendant he was headed back toward Douglasville. I blew the siren and he stopped, he didn't speed up. The first thing I did, I got out and walked to his car, when he pulled off the road. I pulled off behind him and stopped and walked up to his car and asked him to get out. I wanted to talk to him and told him I wanted him to come back to Douglasville to the county jail and wanted to talk to him then. I didn't tell him what I was going to do. He didn't ask me what I was going to do. I searched him, looking for a weapon. You ask if, although I testified that I I didn't go out looking for him as a suspect, it was merely that he was one of several people seen around this store. He was one the three people that were seen there, and there was a murder committed; anybody would suspect him right then if they found the right one. I carried him to town in my car. When I asked him to get in my car, the words I used were, "Billy, I want you to go back up to Douglasville with me, I want to question you," and he said all right. He was with a young lady; who came back in Billy's car with Chief Huckaby, who took her to her father's home, which was her home at that time, and I brought Billy on to the jail house. We sat down on the front porch for a while, then I went to check the car over, and Mr. Rainwater and Mr. Gaston was on the front porch and they talked to him at the jail. I questioned him some after I looked the car over. I searched the car, which included a search for gun. The trunk of the car was not open, but it was not locked. I did not ask Billy to let me look in the trunk. You ask if you are to take it that I don't think I have to ask him. My answer to that is no, sir. I stayed with Billy some 15 or 20 minutes, then I continued to work on the case, like what else I could find out; someone killed Mr. Brown, I knew that. I can remember what I did next. One thing, I went back by the Piedmont [fol. 33] Roofing Company and questioned the man on his salary, how much he made and how long he had been working there and so on. Why I was interested in his

salary, I didn't know at that time how long he had been working there or how long he had been off or anything, that's why I went back down there, we wanted to know how much money he made and how much he could save. I didn't find any money on him at the jail house, Mr. Rainwater and Mr. Gaston found some, not when I was present. I did not search him. I don't know whether he had any money on him or not, I don't know what he had, the only thing I searched him for was a weapon. I then left the jail house, leaving him in the custody of Mr. Rainwater and Mr. Gaston. They were on the front porch when I left. After approximately an hour, I don't know how long, I came back to the jail. I spent that hour, something like an hour I guess, investigating this murder case. When I got back to the jail, Billy was back there on the ground floor of the jail and Rainwater and Gaston were gone I don't know where they were. Billy was not in a cell, he was in the runaround on the ground floor. The sheriff's kitchen is immediately in the front of the jail house. There is an iron door goes into the jail proper, one door, which is usually locked, I don't remember whether it was locked that day or not. The day I took Billy there, there wasn't any prisoners there to my knowing except a trusty. He was back in the hallway or runaround next to the individual cells, behind the door that locks the jail from the sheriff's dwelling. Actually he was in jail, he was not free to take off. That was sometime in the afternoon, I don't remember just what hour it was, sometime after 12 o'clock noon. I didn't ask the defendant any more questions after that. I didn't take him any place till we brought him to the sheriff's office in the courthouse. My testimony is that I brought this defendant from the place where I stopped his automobile and asked or told him to come with me, to the front porch of the jail and left him there talking to Mr. Rainwaters and Mr. Gaston. I didn't put him under lock, as far as I am concerned I didn't talk to Billy Ferguson any more after I left him to go to Piedmont Roofing Company until I brought him to the sheriff's office in the courthouse. I was present in the courthouse. [fol. 34] I stayed there with the officers, I stayed there with him. The deceased man was on the floor when I arrived out there. The bullet that you exhibit to me was some two

or three feet from Mr. Brown's head. How I know, I saw Mr. Gaston pick it up. How I can identify it, Mr. Gaston made a little mark on the end of it right there, a little cross mark. That's the front end of the bullet; the little "x" on the front end of it made me identify it.

BOBBY JACKSON, sworn for the state, testified:

My name is Bobby Jackson. I live in Douglasville. I recall the events occurring on or about the 17th day of July, 1958. I recall the events occurring on the early morning of that date. I left home about 6:30. I arrived at Luke's place, it taken me about two minutes to get there, I stayed there about ten minutes and went to work. I am speaking of Luke Brown's television shop, on the east side of Douglasville out here. My brother Billy was with me. When we arrived down there, Billy Ferguson was sitting out front in a Pontiac automobile. Mr. Brown was arriving about the same time I was. He opened the place of business and we all went in, myself and my brother and Billy Ferguson and Luke. There was not much conversation. Billy Ferguson and Luke were talking about some rollers over at the asphalt plant. I remained there approximately ten minutes. When I left, my brother left with me. Billy Ferguson and Luke Brown remained in the TV shop. The man that I call Billy Ferguson is sitting there in the white shirt.

Cross-examination.

My first name is Bob. I arrived at this TV repair shop around 6:30. We meet there every morning to catch a ride. I live about a block and a half from there. I don't walk over there, I travel in an automobile to catch a ride. Sometimes I leave my car there, but not that morning, four of us was working together, we take turns, one drives one week and another drives another week. My brother and I were over there that morning. As to whether there was anybody else there besides Billy Ferguson, Luke was ar-
[fol. 35] riving when we drove up, he was going up to unlock, we pulled up when he did and he walked up in front of the building. When he unlocked the door I would say it was around 6:33; we usually leave about 6:30, it might have taken us two minutes to get there, and in a minute or

so he opened the door. It was not raining that morning, the best I remember it was a clear day, Thursday I believe, I am not positive, and as to whether I am positive it was 6:33, I said around that. When my brother and I got there, we usually go in the store if our riders are not there, to pass the time of day till they arrive. We did that that morning, we went on in that morning. Billy Ferguson was there when we arrived, his car was parked in front of the building, directly in front, not around to the side. I was there around ten minutes. I didn't know Billy, I never saw him before that morning. I didn't ask Mr. Brown what he was doing there that morning. He and Billy were talking, friendly talk. Mr. Brown did not proceed to go to work on anything while I was there. Just . and my brother and Billy and Luke were there. I do carpenter work in Atlanta at different places. I make pretty good money, I make a living. That week I made $102 working, that's for 40 hours. We may work one day at one house and another day at another house. Billy was still inside the shop when we left. I didn't see him or Mr. Brown arguing or anything, they acted friendly. I didn't see anyone with a gun, I didn't see the defendant with a gun. I saw a gun in the place when I was in there in the pocket of his overalls, that was when we went in. The only place I saw the gun was in his pocket, when we went in and all the rest of the time I was standing right by the side of him when he opened the door, and seen it, and that's the only place I saw the gun, as far as I can tell, I never saw it anywhere else.

BILLY JACKSON, sworn for the state, testified:

My names is Billy Jackson. I live on Oak Street here in Douglasville. I recall the events occurring on or about the 17th of July 1958. I was at home early that morning and had to go to work, I left home somewhere around 6:30 and went to Luke Brown's shop, arriving there anywhere from two minutes until 6:30 to two minutes after. When [fol. 36] I arrived down there Billy Ferguson's car was sitting out in front, headed toward Douglasville, and he was sitting in it. My brother Bob Jackson was with me. Luke Brown pulled up right behind us. When he pulled up, we got out and went in behind him, with Luke. Billy Ferguson came in too. We stayed in the store around

ten minutes. As to whether any one else arrived while I was there other than those I have mentioned, our riders came somewhere around 20 minutes to 7. They didn't come in the store, we saw them coming and we got up and went out and left, that is, my brother and I got up and went out and left, leaving Luke Brown in the TV shop. I don't remember seeing a pistol there that morning.

Cross-examination.

I got there somewhere around 6:30 and was around there around ten minutes. I saw Billy Ferguson and Luke there. When I arrived there, this boy was sitting in his car headed toward town, and after we got there Luke Brown pulled up behind us and we got out and went in and he came on in behind us. Luke and this boy was talking about the equipment that they have at this asphalt place. I didn't see a gun, I didn't see anybody with a gun, I didn't hear any shots fired. All I really know about the case is that I happened to be at a store at the same time that this defendant and the man who owned the store were there.

Redirect examination.

What I said, that no one had a gun or I didn't see a gun, I don't remember seeing one.

Mrs. Shirley Truitt, sworn for the state, testified:

My name is Mrs. Shirley Truitt. I live in Alpharetta, Georgia. On July 17, 1958 I lived on Thompson Street in Douglasville. That morning I was on Conley Drive in Bob Jackson's house, my brother-in-law. I was in the living room and heard two shots, between 7 and 7:30 in the morning. They were fast, something like I clap my hands (indicating.)

[Col. 37] Cross-examination.

I live in Alpharetta. On the 17th of July 1958 I was living on Thompson Street in Douglasville. It's Mrs., not Miss. You ask how close is the street that I lived on to where this alleged crime took place. I would say it is about a mile from uptown. I had spent the night with

them, my sister-in-law and my brother-in-law Bob. I got up about five until seven and went in the living room and lay down on the couch. It wasn't too warm; the baby had woke up and I lay down with him, it was my baby. I didn't go back to sleep. I might have been dozing, but I was just lying there awake. I didn't have my eyes closed. That was at the front of the house facing directly toward this TV station, it was only about a block and a half from the TV repair shop. My home was about a mile from the TV shop. The house where I was staying was about a block and a half, average blocks, from the TV shop. The house was facing toward the TV repair shop and I was lying in the living room, in the front part of the house. I had the windows open; it was a hot morning, and I had to feed my baby. I got up at five minutes to seven. My brother-in-law and his brother had left before I got up, so they were gone. Nobody else was awake in that house besides me and my baby. I know the difference between a gun firing and an automobile backfiring. I have heard a gun before, I have heard my brother-in-law and my husband go out and shoot. I couldn't tell you whether my brother-in-law and his brother had a gun. I have heard gun shots; they had a gun at the time I heard them, I don't know whether it was their gun or not. I can't tell you definitely how long ago that was. It is not true that I could be confused, that because I heard other people say there was a couple of shots fired, that maybe I heard shots that morning or backfiring or something and I assumed it was a gun; I know it was a gun. The solicitor in using his hands said bang-bang, two times. I heard two shots.

Mrs. Jessie Thompson, sworn for the state, testified:

My name is Mrs. Jessie Thompson. I live here, on 78 highway. I know where the place is located on 78 high-
[fol. 38] way that is known as Luke Brown's TV repair shop. My residence is east of that. I know the defendant here on trial, Billy Ferguson. He came to my place on the morning of July 17, 1958 and bought a pack of cigarettes. I run a supermarket. That was between 6 and 6:30 in the morning, I don't know what time it was exactly. I had no conversation with him at that time only he said he

wanted some cigarettes. He stayed in my place of business about five minutes, maybe ten. As to whether during that length of time he engaged in any conversation with me or anyone else, I asked him if there would be something else and he said no. Billy's condition and manner of acting was normal. I didn't notice anything unusual.

Cross-examination.

My place of business is about two miles east of Douglasville on 78 highway, beyond the TV station from Douglasville, in the same general direction from Douglasville. I believe it is two miles from Douglasville. The defendant came to my place of business between 6 and 6:30 on July 17, 1958 to buy a package of cigarettes. I have the cigarette packages behind the counter. He was alone. I didn't see whether he came in a car or how he was traveling, I just saw him come in the store. He had been in the store before. He had never done anything wrong or caused me any trouble. I don't believe he ever has come in the store when I was alone, usually there is always somebody in there. This time it was Mr. and Mrs. Johnson: Mr. Johnson worked for me at that time. All I know about this case is that at 6 or 6:30 Billy Ferguson, the defendant, came in my store and bought a package of cigarettes.

J. A. Miller, sworn for the state, testified:

I am Mr. J. A. Miller. I live in Douglasville. I am manager of Piedmont Roofing Company. In that capacity I had occasion to know Billy Ferguson: he was in my employ. I believe July 17, 1958 was his day off: he was employed by me and that was his day off. I saw him that day, I met him on my way to work, on highway 92, just [fol. 39] off 78, just at the corner as you turn off. I believe there is an Amoco filling station on the corner. The direction Billy was traveling that morning I believe would be south, away from the TV repair shop operated by Luke Brown. I saw him around 7 o'clock in the morning.

Cross-examination.

There was no particular reason why on that morning I noticed his presence there. I just happened to see him.

I did not stop and talk to him. He was not traveling at a high rate of speed. I waved at him. The best I remember, he waved back. That was about 7 o'clock. It couldn't have been 8. Billy had a Pontiac I believe. It was not a Buick; it was a Pontiac, I couldn't say what model. I think it was black. To my knowledge that morning Mr. Ferguson did not have a pistol in his possession. I have read in the paper about this case, but know nothing about it in my actual knowledge. Mr. Ferguson was an average employee, he worked regularly, and as to whether he worked hard, he worked average. I have known Billy Ferguson approximately three months, during which time he was my employee.

Redirect examination.

When I met Billy Ferguson I was in my automobile and he was in his. I don't know whether he had a weapon or not, possibly he could have.

J. D. Gaston, sworn for the state, testified:

My name is J. D. Gaston. I am and for six years have been an agent with the Georgia Bureau of Investigation. In that capacity I have certain counties assigned to me in my jurisdiction, one of which is Douglas County. I was so employed on the 17th of July, 1958. I have been a law-enforcement officer approximately 19 years. I was in the sheriff's office in Carroll County four years and with the State Patrol about ten years. Around 8 o'clock in the morning of July 17, 1958, maybe a little later, I received a call to Douglas County, in response to which I went of Douglasville TV shop on 78, just east of Douglas-[fol. 40] ville, arriving there at approximately 9:30 I believe, between 9 and 9:30. In my capacity as stated I assisted other officers in the investigation of that case. When I arrived at the TV shop we found the body of Mr. Luke Brown. I say we found it; Mr. Rainwater was already there and several others. The body was lying on its back. State's exhibits five and ten, photographs, correctly portray the p-sition of that body and the situs of the wounds on the body at the time I arrived down there. I partially examined the body for wounds. The only wounds that we could find at that time was a wound on the finger and a

wound through his ear and the hair line above the temple. I later examined the body for wounds and found one in the back and one in the head, in his temple, straight away, not the one we found at the scene. As a result of our examination I had occasion to talk to Billy Ferguson that day. I first saw him a little before noon, he was on the porch of the county jail. At that time I had a conversation with him, Mr. Rainwater, the deputy sheriff, also being present. We moved on into the sheriff's office and the conversation occurred there. At that time Billy Ferguson made a statement to me. It was made freely and voluntarily. There was no threat of bodily harm used by me or anyone else in my presence in order to induce the defendant to make a statement. There was no reward or the hope thereof offered to Billy in order to induce him to make that statement, by me or by anyone else in my presence. The conversation that we had at that time, just before noon on the 17th day of July, 1958. Mr. Rainwater and I told Billy Ferguson that the reason we were questioning him, he had been seen down at Mr. Brown's TV shop that morning, and he admitted that he was down there. He said he went down to get his radio repaired, and he denied everything else that happened down there. He said he left Mr. Brown's place and went to his girl's house, which is a short way from there toward Douglasville, west of the TV shop, and picked up his girl friend and went by the launday and left some clothes I believe, and then went to another place near by to see about renting a room, and from there he went to Villa Rica, Georgia and started back toward [fol. 41] Douglasville and was overtaken by Mr. Rainwater and Mr. Cooper, deputy sheriff, and Chief Huckaby, and was brought to the jail where we talked to him. While questioning him we asked to see his billfold. He pulled it out, and there was over a hundred dollars, a hundred and twenty something dollars in his billfold. His explanation of where the money came from was that he had been saving it. He had $125 in the billfold consisting of three fives, ten tens and also some silver in his pocket that wasn't in the billfold. I can identify the money in the envelope that you hand me, containing $129 in bills, being eleven tens, three fives and four ones, one half, one quarter, one dime and one nickel. I sealed that money in this envelope and put the

date on it and where it came from. It came from Billy Ferguson's billfold, out of his pocket. These three or four ones were loose in his pocket. I can identify the papers in the man's billfold that you hand me. This looks to be the same billfold that came from Billy Ferguson's pocket. The conversation with Billy Ferguson about the amount of money he had in his billfold was, we asked him where he got it and he said he had saved it. Later, I and other officers went to the rooming house of Mrs. A. W. McLarty in Douglasville, in the early afternoon, I believe around 3 o'clock or 3:30. With me were Lieutenant T. A. Smith of the GBI and Chief Huckaby, Douglasville chief of police, when we arrived at that rooming house. When we arrived there we talked to Mrs. McLarty. We searched Billy Ferguson's room, we searched the bed, the mattress, the closet, the bed clothes that was in the drawer there, and also in the attic. The attic has a hole large enough for a man to go through, in a closet in the room. We took a chair and stood up in the chair. At first we felt, we could barely reach up there, and felt around the edges after removing the door, then we took a chair and felt at arm's length around up in the dark, and I felt a gun and a pocket book, in the attic of his room, in the loft, that was by standing on a chair and reaching up. The U.S. pistol revolver that you hand me, break-back type, with the number 68123 imbedded in the trigger guard, is the gun that I found in the attic of Billy Ferguson's room. At the time I found it it was loaded, three fired and two live, five rounds in all. [fol. 42] The pistol is in the same condition now as it was then, except for being loaded. The billfold that you hand to me, being a brown man's billfold with the trade name "Amity" and with 34 one-dollar bills and six five-dollar bills therein and some papers in it, I can identify as the billfold that I found in the attic of Billy Ferguson's room. At the time I found it in the attic it contained a driver's license made out to Luke A. Brown, Georgia driver's license No. 362531, also one insurance service card made out to L. A. Brown, one bill of sale made to L. A. Brown for a 1950 Chevrolet panel truck, motor number B-boy A-Alabama 804084, and a Georgia tag receipt made out for a 1952 Studebaker, Georgia license number 8OE351, also one peace officer's card made out to L. A. Brown, 21322. These

were all in the billfold that I found. The billfold that you handed me is in the same condition now as it was at the time I found it in the attic of Billy Ferguson's room. After we found the things mentioned, we found in the closet there, there was clothing, there was a Navy badge with the name B. R. Ferguson, serial number 6811671. We took the money out of the billfold and counted it in the presence of Mrs. McLarty, then we went from there to the courthouse and I turned the billfold and gun over to Deputy Sheriff J. B. Cooper. After we found that gun and that billfold that I have testified about, I had further conversation with Billy Ferguson, at which time he made a statement to me. That statement was made freely and voluntarily. He was not placed in any fear of any bodily harm by me or anyone else in my presence in order to induce him to make that statement. When I arrived back, Billy Ferguson was in the courthouse in the sheriff's office. I exhibited to him the gun and the billfold that I found. He said, "That's the gun I killed Mr. Brown with and this is the billfold that I took from his pocket." He demonstrated how he killed Mr. Brown. He stated that he went to Mr. Brown's TV shop and asked Mr. Brown to repair his radio, that he and Mr. Brown went to the car, and while Mr. Brown was working on the radio he went back in, or Mr. Brown sent him back in after a screwdriver, and that he saw a pistol hanging on a nail in the shop while Mr. Brown was repairing the radio, that he stuck the pistol in his pocket and went back out to help Mr. Brown [fol. 43] finish repairing his radio, and that after they finished the radio Mr. Brown walked in the TV shop and was facing the cash drawer and that he shot him in the back, that he fell on his back and that he threw both hands up, he was still conscious and he threw both hands up, and he threw the gun in his face and shot through his fingers and grazed his head. He said he saw that he didn't kill him, and he stuck the gun in his temple and fired the third shot to make certain that he was dead. I asked him why he killed him, I asked him why he didn't take his money and leave his life, and he said, "If I had let him live he could have told who I was." Billy Ferguson later made a statement to T. A. Smith in my presence, which was reduced to writing. He was not offered any reward

for making the statement that he made to T. A. Smith, nor was he placed in any fear of bodily harm coming to himself or anybody else by me or by anyone in my presence at the time he made that statement. That statement was freely and voluntarily made. He told us that that was the gun that he killed Mr. Brown with. We advised him that he had a right to have an attorney, and also advised him that he didn't have to make a statement, but that if he was willing, we would put it in writing, and he said he would like to do it, he wanted to cooperate on that. No threats or gestures of bodily harm were made in my presence by me or anyone else, nor any promises or offers made to him in order to induce him to make that statement. The statement was made freely and voluntarily. What you hand me is the bullet that I picked up off the floor of the TV shop a few inches from Mr. Brown's head, and I turned that bullet over to Deputy Sheriff Cooper. I marked it. I identify it.

Cross-examination.

I have been with the GBI six years. I was a police officer before that, a sheriff or something. I think the GBI has a wonderful laboratory, fully equipped. They sent me to the FBI Academy in Washington, D.C., to learn more about crime investigation, that was what they taught us up there, crime detection, investigation, law enforcement in general. They taught us some about finger prints. I didn't go into [Vol. 44] ballistics. You ask if I really would have a case if I had finger prints on the gun. It would be practically impossible to take prints off of a rough handle of that type of gun. You state that they sent me to Washington to the FBI school and I have been in this business six years, and that I am telling the jury that it is impossible to get finger prints off of a gun, and ask if it isn't true that I don't mean that. I say it would be practically impossible on a rough grain, it would be impossible on that handle there. It could be on there but you couldn't read it, that is my opinion. A smooth surface is all that you can get it off of. It would be very unlikely that they could get finger prints off of the gun if somebody handled it. I testified that I sealed this envelope with this money in it. I don't know who tore it open; I turned it over to the

sheriff's office. We took the serial numbers of the bills. I did not refer to the serial numbers when the solicitor asked me if I could identify them, I didn't have them in my possession. As to whether I said "I can identify them," I said that was the same envelope that I sealed. As to whether I said it was the same money because I sealed the envelope up, I said it was the envelop that I placed the money in. I sealed up the envelope with some money in it, but I myself didn't reopen it. I don't know whether that money has been changed or not. I never checked the serial numbers. As to whose wallet I said that was, I said it was similar to the one that Billy Ferguson gave us, that was taken off of Billy Ferguson. This (indicating) is the one I found with the gun. We didn't check that for finger prints, we got a confession before it was necessary, he admitted taking the pocket book; we didn't see any necessity for it. He didn't admit it before I found it. I testified that I went in his room, up in the attic, and stuck my hand up and found the gun and found a wallet. You ask what it has to do with finger prints if he told me something, and if I took out my handkerchief and picked the gun up. I didn't know there was a gun up there. I took it in my hand. Why I wasn't careful with it afterwards, it was too late then. You ask this question: "You have a man on trial for his life, and because of your carelessness you don't think it could be established, you think it is all right to say, 'Well, we found a gun, we didn't find any finger prints'"? My answer is, after we picked up the [fol. 45] gun it would be unlikely that you could have gotten one off it if it had been on there. I was scrambling around in the dark, when I pulled it down I still didn't know what it was. Nevertheless I testified I didn't think finger prints were necessary, I think it was imposible to get them off. I don't know to my knowledge that that room was ever searched before that same day, I was not present, I didn't say the roomf was searched but one time. I had heard that others had been down there, I don't know whether they searched the room or not, to my knowledge I don't know, I wasn't there. I knew they had been down to the rooming house, I don't know whether they searched it or not. We went back to talk to the lady of the house, and we decided to re-search the room. We were

looking for the murder gun and a pocket book with money in it. We didn't go right to the attic; that was the last place that we went. When I say "attic" I mean a little hole up there, in the closet of his bed room. As to whether we searched his private purse, we quit when we found what we were looking for. That was the last thing we searched. We went there and found a gun and a wallet, then we quit searching. We didn't know where to look for it, we searched the entire room, the bed, clothing, mattress, drawers. We searched the closet, after we found the gun and the pocket book we quit searching, that was the last thing we searched, meaning the attic was the last thing we searched. We had searched everything before we searched the attic, and found nothing, and were about to leave and changed our minds and went to the attic. We searched the closet. In the closet we didn't find anything on the floor, we found the gun and the pocket book in the attic over the closet. How I identified this bullet, I attempted to put my initials on there, right in the end. The little initial "X" or whatever it might be is on the rear end of the bullet, not on the leading edge of the bullet, I didn't mark it on the leading edge, there is no mark that I made on the leading edge. The only mark that I made was on the rear end of the bullet. There is nothing that I see, as a GBI investigator, to link up any of this evidence that I have here, gun, wallet, money, anything else, with the defendant here. I didn't use finger prints [fol. 46] in the investigation in any shape or form whatsoever. We used old-fashioned leg work and questioning the suspect.

Redirect examination.

I was present when a paraffin test was made in this case by Dr. Larry Howard, one of the technicians at the crime lab in Atlanta. He is out here on this case.

Recross-examination.

How you make paraffin test, you put a liquid substance on the person's hands, and it hardens, it is an examination for powder of a gun. Mr. Howard can explain it better; I am not an expert on the paraffin test. I was there part of the time when it was made, not all the time. The par-

affin test was made at my suggestion. I don't believe Mr. Howard did any investigating at the place of residence or anything like that, I don't believe he went out there, not with me. I thought it was a good idea to make a paraffin test, I called him and asked him to bring his equipment for the test. I think it is a help. It is a help if you can get finger prints, under certain conditions.

Redirect examination.

It was Mr. Rainwater and Mr. Cooper that requested that Dr. Howard come out here.

JAMES RAINWATER, re-introduced for the state, testified:

When I arrived at Luke Brown's TV repair shop I observed a lead bullet on the floor not too far from Mr. Brown's head, on the left side, not too far from his head right here (indicating on state's exhibit No. 5), and then on the furniture you can see where the bullet hit right in there. I observed the manner in which Luke Brown was dressed. The man's black and pink and white striped sport shirt that you exhibit to me looks like the garment that he had on, and the overalls. I believe that's the shirt. I believe I can identify the men's overalls, zipper type [fol. 47] bib, with the trade name "Anvil, Hard to Beat" imbedded in the buttons, according to the way he had the billfold up there (indicating), that's the way I identify it. I believe those are the garments that he was dressed in at that time, to the best of my knowledge. They are now in the same condition as they were at that time except for normal wear. I have not had these garments in my possession; Mr. Howard took them. I was present when a conversation was had with the defendant when I arrived at the jail up in the morning, when Mr. Gaston was at the jail. The conversation occurred inside of what we call the sheriff's office. I was not present later on during the day when another conversation was had with Billy Ferguson, not till later in the evening I was not present when a conversation was had at the courthouse, it was over when I got back from Dr. Howard's. The revolver type break-back pistol with the number 68123 imbedded in the trigger guard which you exhibit to me is

the one that they had when I got back to the sheriff's office. That object was turned over to me and I have had it since that time. It is in the same condition now as it was when it was turned over to me on July 17. The man's billfold that you exhibit to me, with the trade name "Amity" and with driver's license made to Lake Brown, with 34 one-dollar bills and six five-dollar bills, looks like the billfold that was in the office with the gun when I got up there. I have had it in my possession. It is now in the same condition as it was at that time. The brown man's billfold with papers in it which you show me I believe is the one that Homer Ferguson had in his possession that day, or Billy Ferguson. That was turned over to me that day, sealed up, and has been in my possession since that time. It is in the same condition now as if was then. I can identify the envelope that you show me, containing eleven ten-dollar bills, four one-dollar bills, one 50 cents, one quarter, one dime and one nickel, that's the one that they put the money in and Mr. Gaston put the date on there and I wrote Ferguson's name on it. It is in the same condition now as it was at that time, except it has been opened. It has been in my possession since that time. The four objects that I have just testified about I turned over to the solicitor. Somewhere I have a memorandum of the serial numbers of the bills.

[fol. 48] Cross-examination.

I have been sitting right here, off and on. When the solicitor says can I identify this, so many ones and so many fives and so forth, and I say "Yes, I can identify it," I mean I can identify the envelope. As to whether I know it is the same money or not, it hadn't been broken until it was turned over to the solicitor, who broke it open. Mr. Gaston sealed it. I was in the room. I heard him testify that he sealed it up. I don't know who opened it. The picture that you exhibit to me is the one that I have shown the jury. That (indicating) is where the bullet was lying. There was a mark put on the piece of wood. As to who told me that that was made by a bullet, that's the symptom of shooting a gun in the wood. I don't know if that's soft pine, I didn't examine it. It was splintered off a little. I could tell that it was a bullet hole, according to the way

I shot the gun. I believe it was a little too large for a pick or nail or something like that. I don't know what size bullet made that hole. This is a 32 gun. I wouldn't swear that this is the gun that made that hole. I would think so, on account of finding the bullet there. I would not swear that this gun made that hole in that piece of wood; there might have been another gun in there for all I know. I wouldn't say what gun made the hole. I wasn't there when it happened.

Redirect examination.

You ask if I can point out in state's exhibit three something in the furniture that I have described. I believe you can see it better in this one than you can in the other, right above the right shoulder.

Exhibits admitted in evidence, as follows:

Revolver type pistol with the number 68123 imbedded in the trigger guard.

Man's Amity billfold with papers testified to by the GBI agent and the money, 34 one-dollar bills, six five-dollar bills.

Envelope containing eleven ten-dollar bills, three five-dollar bills, four one dollar bills, one half dollar, one quarter, one dime and one nickel.

Man's brown billfold containing papers with the name of B. H. Ferguson, Billy Homer Ferguson, and Homer Ferguson, imbedded in the paper.

[fol. 49] Recess until 9:30 A.M., September 24, 1958.

Sol. Gen.: I state in my place, by agreement of counsel, that I opened the envelope containing the brown billfold, with the papers contained therein, marked Billy Homer Ferguson and B. H. Ferguson, in preparation for the trial of this case, on Tuesday, that I received these items from James Rainwater. I stipulate further that I received an envelope containing a man's billfold with papers therein marked Lake Brown and L. A. Brown with 34 one-dollar bills and six five-dollar bills contained therein, from Deputy Sheriff James Rainwater, and that I opened that envelope on

Tuesday in preparation for the trial of the case, and that both the envelopes were sealed at the time I received them. I further stipulate that I received an envelope containing eleven ten-dollar bills, one $5 bill, 34 $1 bills, a half dollar, a quarter, a dime and a nickel, on Tuesday from Deputy Sheriff James Rainwater. At the time this envelope was received by me it was sealed, that I opened the envelope in the preparation of the trial of this case, that I opened it on Tuesday.

MARVIN HOGAN, sworn for the state, testified:

My name is Marvin Hogan. I live at the Hilltop Cafe on 78 highway. During his lifetime I had occasion to know Mr. Luke A. Brown. We fished a lot together. You ask if I had an opportunity to observe a pistol belonging to Luke A. Brown. We shot the pistola lot. I can identify a 32-caliber revolver type break-back pistol with the number 68123 imbedded in the trigger guard; this is Luke's pistol, the pistol that belonged to Luke Brown. That pistol hung right up in from of him against the wall in the place of business when he was sitting down. Photograph marked state's exhibit 18 seems to be a true and correct representation of the facts as it purports to show. It [fol. 50] shows the gun on the wall there in its usual place of hanging.

Cross-examination.

I work at International Paper, Atlanta. I have known Luke Brown approximately eight years. I have fired this gun; why I fired it, we was hunting and fishing together a lot and we carried it along to shoot fish bait and things like that, frogs and so forth. You ask what is there about that gun that makes me positive that that was the pistol. If you have shot a gun as much as that has been shot, I believe you would—As to whether I believe there was ever another gun manufactured like that, or that that is an exclusive gun, it is not an exclusive gun. You ask if it isn't true that there is nothing about it that I can tell this jury that I am positive that this is the gun because I put my initials on it, or if there is anything about that gun that I could tell this jury, "I can prove by a certain mark on

the gun that it is his gun," it looks like his gun but I can't swear that it is his gun, no, I couldn't swear to it.

Redirect examination.

I have shot this gun.

Recross-examination.

I shot that gun, rather than a gun that looked like it. You state that you want me to tell this jury, "Yes, this is the gun that I shot," and "Yes, this is the gun, because" and then identify it. My answer is, the handle on there. The handles on most of them are bone handles. As to whether it has got "U.S." on it, that's the handles that he put on the gun. Whether another gun wouldn't have the "U.S." on it I don't know.

VINCENT HENDERSON, sworn for the state, testified:

My name is Vincent Henderson. I am employed in embalming, with J. Cowan Whitley. I recall the events occurring on or about the 17th of July 1958. On that day I had occasion to see the body of Luke A. Brown in my [fol. 51] official capacity. When I saw the body it was clothed. I removed the clothing from that body. I am sure that the man's sport shirt with black and white or some other color stripes which you show me is the one that was taken off of Luke Brown. As to the pair of man's overalls with the trade name "Anvil, Hard to Beat" imbedded in the buttons, with zipper type pocked on the front, I am not sure about the brand, it was similar to that, the pair that was taken off of him. I would say that is the pair that was taken off of him, and that's the shirt.

Cross-examination.

I did not mark that clothing. I gave it to a representative of the GBI. It looks like the same clothes that I took off, that's the way I remember it, it looks exactly like it.

Redirect examination.

As far as I know, that clothing is in the same condition now as it was at the time I removed it from the body of Luke Brown, except for normal wear.

Dr. LARRY B. HOWARD, sworn for the state, testified:

My name is Dr. Larry B. Howard. I am presently assistant director of the Georgia State Crime Laboratory and was so employed on or about the 17th of July 1958. In that capacity, in response to a call to Douglasville on or about the 17th of July 1958, I came to Douglasville and went to the Whitley Funeral Home and performed an autopsy on a body. I attended the University of Montana and the University of Minnesota. I received a B.S. degree from the University of Montana and a Ph.D. from the medical school of the University of Minnesota. By B.S. I mean Bachelor of Science, and Ph.D. from the medical school, Doctor of Philosophy. That includes pharmacology, which is a study of the action of drugs and poisons on the human body. As to the length of my employment in that field and my experience, I have been employed by the state crime lab for two years, and previous to that I [fol. 52] taught three years at medical school. In that five years I have autopsied somewhere between three and four hundred bodies. I have studied weapons under Dr. Jones, director of the crime lab, two years, right up to the present time. I have made about 100 ballistic examinations during the course of my studies with Dr. Jones. I have done paraffin tests for about two years, all told, about 50 or 60. I have made an examination of the pistol which you hand to me, being a 32-caliber revolver with the number 68123 imbedded in the trigger guard. I have seen the lead spent bullet which you hand to me with a marking on the rear portion of it; it was given to me by Deputy Sheriff Cooper. I examined the bullet. Dr. Vansant and I recovered a bullet from the body of Luke Brown in the intestines, near the right pelvis. I have that bullet here in the evidence, in the sack that you just handed me. That bullet has been in the state crime laboratory evidence room since I removed it from the body of Luke Brown. It is in the same condition now as it was when we removed it from the body. I examined that bullet under a comparison microscope and compared it with several bullets that I fired from the weapon that was handed me, and grossly and microscopically the examination showed that it came from this gun. The bullet that you handed me was fired from this old U.S. 32-caliber revolver. I tested that bullet

for human blood. It had human blood on it. I also compared the bullet that I recovered from the body of Luke Brown with test bullets fired from the old U.S. 32-caliber revolver. Grossly it showed that the bullet was fired by an old U.S. revolver, that is the bullet that I have in my hand. However, it was badly mutilated, so that I can only say that microscopically speaking, I can only say that it was probably fired by this particular weapon. There is no question but that the bullet that was handed to me by Deputy Sheriff Cooper was fired by this 32-caliber revolver. X-ray film marked state's exhibit 15 shows the location of the bullet that Dr. Vanzant and I removed from the body of Luke Brown. I examined that body for wounds. I found evidence of five different wounds. The first was a contact type of wound over the temple area, the wound penetrated the skull and went into the [fol. 53] brain. There were powder burns around the wound, indicating that the gun was fired at extremely close range. Next, there was a groove through this side of the head, passing through the ear, it resembled a glancing blow from the bullet, it was grooved, the bone was broken and it was grooved from the outer edge of the eye all the way back to here (indicating). There were no other powder burns on that wound. The next one was a wound in the hand that went through the fingers here, breaking the finger bone, with powder and cartilege around this part of the finger. There was another wound, groove, between these two fingers, on this side of this finger and on this side of this finger (indicating), grooved by the same weapon. There was also a wound on the left side of the back 52 inches above the heel, just opposite the vertebrae. It did not show any powder burns on the body. From my examination of the wounds on that body and my scientific tests that I have described, in my opinion the subject had his hands up in this manner (indicating), that the gun was fired extremely close to this finger and the bullet passed through this finger, between these two fingers, and grooved the side of his face, breaking the zygomatic arch. Photograph marked state's exhibit number one correctly represents the situs of the wound that I have described. The same is true of state's exhibits numbers three, four, six, eight,

and eleven. State's exhibit number seven represents the wound in the hand, it is true and correct. State's exhibit nine is a true and correct portrayal of the facts that I have described, correctly identifying the situs of the wound. The shirt that you exhibit to me, which you describe as brown and white and you guess biege stripes, is the shirt that I picked up at Whitley's Funeral Home. It has since been locked up in the state crime laboratory evidence room, in my possession. It is now in the same condition that it was at that time. I did not make an examination of those stains in order to determine what they were. My opinion would be that they are blood; there is a clot there. The Anvil-men's bib type overalls which you hand me is a part of the clothing that I picked up at Whitley's Funeral Home. That has also been locked up in the evidence room at the state crime laboratory. I picked it up on the 17th of July. It is now in the same [fol. 54] condition that it was then. I photographed the overalls with infra-red photography. We made comparison photos with regular photography and infra-red photography, and the infra-red photograph shows up carbon, whereas the regular photography doesn't. By comparing the two pictures we can get accurate representation of whether or not a weapon has been fired at the particular garment. The result of my examination of this garment showed that this, around the bullet hole, in the overalls, there was a heavy deposit of carbon, about half an inch in radius around the hole, indicative of a very close discharge of the firearm toward the garment. I can identify photographs marked state's exhibits 12 and 13. The laboratory photographer exposed those photographs, under my direction. I was present when it was exposed. This is a true and correct representation of the facts shown in this photograph. State's exhibit 13 is normal photography, and it shows just a slight blackened area around the bullet holes. State's exhibit number 12 is infra-red photography, and it shows carbon particles around this area of the clothing. While I was out here on the 17th of July I did a paraffin test on Billy Ferguson, who is between the two ladies at the end of the table there. The purpose of the test is to test for powder residue. When gunpowder goes off it leaves certain combustion products

that you can test for. The test for this is made under such chemical conditions that it is impossible to do it on living tissue, so in order to perform it we coat the hands, in this case, with melted paraffin, which draws the combustion products out of the skin onto the paraffin, and we take the paraffin and subject it to the conditions of the test. I applied paraffin to both hands of Billy Ferguson, and removed the paraffin and examined it. I found evidence of powder on the palm of the right hand and on both sides, both the palm and the back of the left hand, indicating that the subject had recently fired a firearm. It was about 2 o'clock in the afternoon when I applied that test to those hands. The bullet that was handed to me by Deputy Sheriff Cooper that I have testified as coming from this pistol that I have examined is in the same condition now as it was when it was handed to me by Deputy Sheriff Cooper. I have had it since that time, [fol. 55] except when I handed it into court. The slug which I removed from the pelvic region of Luke Brown is in the same condition now as it was when I removed it from the body of Luke Brown. Since that time it has been locked up in the evidence room at the crime laboratory, in my possession until I removed it yesterday and handed it to you. This is the bullet. The bullet wound in the head would have caused the death of Luke Brown, there is no question about that, it did cause death.

Cross-examination.

I attended school at the University of Minnesota and the University of Montana. I went to Minnesota in 1950 and 1956. I got my degree in pharmacology from the medical school; that is the study of drugs and their actions and poisons and their actions on the human body. Pharmacology is one of the basic sciences of medical school. I did not get an M.D. degree. As to whether I got any degree in my study in the university or college that made me an X-ray technician, the study of X-rays, I submit my qualifications. I don't state whether I am an expert or not, that is up to the court. What you indicate to me is part of the pelvis, called the iliac, and this down here is the sacrum. What makes me think that is a bullet is because of the high degree of calcium. The bone is full of calcium, you

can see it. As to whether there is any real calcium there stands out, all the bones are calcium. As to whether there is any spot where it is excessive, down near the humerus, certainly, it would have been greater. I don't know what this is down here that you indicate to me. It is not the right size and shape for a bullet, it doesn't look like a bullet. I couldn't be sure it wasn't a bullet unless I went in there and looked for it, but I am sure that's a bullet (indicating). I got it out of there. This is the bullet that I say was in the X-ray. I recognize it by the scratching and abrasions on it, the abrasion probably caused by the bone. Whether it was caused by anything else, it could have hit anything. This is the one that I myself took out of the body, Dr. Vansant and I together. When we took it out of the body I locked it up in the back of the car and took it back to the state crime laboratory [fol. 56] and matched it with known bullets fired from the old 32 U.S. revolver here on my right. The bullets for comparison I took out of our ammunition supply in the crime laboratory. We have a complete supply of the same type bullets for firearm identification. I fired those bullets myself with that weapon and compared those that I fired from that weapon with the bullet that I recovered from the body. After I fired the bullets, first I looked to see the direction of the twist of the lands and grooves and their approximate width, then I put them under the comparison microscope and looked at them microscopically. I did not make any photographs of those bullets. We rarely do that any more, because it is very rarely asked for, it entails several hours more work. Defense attorneys rarely ask for them. I didn't say that it is my opinion as an expert that the defendant seldom asks for them, I said his lawyers. You ask if I want to say that the defendant's lawyer very seldom asks for them, and if it is my opinion from my experience that the defense lawyers or the defendant himself has to ask for proof to convict him. I told you that I looked at them under the microscope and they are exactly the same. You ask if I got the defendant's consent to making the paraffin test on his hands. I was requested to come, by the sheriff. You ask if he sat down and asked me to examine him thoroughly and tell him about it. I was requested to do that by the sheriff, yes.

As to my being requested by the sheriff to bring any evidence, I was subpoenaed by the court, not from the GBI, the state crime laboratory, they are not exactly the same thing. The state crime laboratory, I am with Dr. Jones. You ask if the state crime laboratory doesn't have setups to photograph grooves and lands. We have not photographed a bullet now for about a year. We can if it is necessary, they have equipment to do it. You ask if it isn't true that they also have equipment such as a projector or whatever it is, to bring in here and put the bullets up side by side before the jury to see them. We can make the pictures, yes. The bullets matched so well that I didn't think it was necessary, that is my opinion. You ask if this isn't what happened; that I didn't think enough of it to come in here and show these twelve ladies and gentle- [fol. 57] men and say, "Here's the truth, there is no question about it," that I could have done it, that I have the equipment, that the state spent the money to get it. I could have done it, yes. Dr. C. V. Vansant and I were at the funeral home together, we examined the body together. I didn't do it as a medical doctor. It is not my opinion that the two wounds that I have testified to his hand, he could have been shot after he was dead; it was antemortum. If you told me that Dr. Vansant didn't say that, that would not be an indication that he didn't examine him very well; it may not have been asked him. I don't know what his reasons were for not mentioning it. A while ago I told the solicitor that the bullet wound in the head was fatal, that was the cause of death. You state that Dr. Vansant said the cause of death was multiple gunshot wounds, and ask me if that would be my opinion. That's kind of academic, because we know that a bullet wound of that type would cause almost instant death. Deputy Sheriff Cooper handed that revolver or gun to me, not wrapped. I didn't ask whether finger prints had been taken off the gun, I didn't ask about finger prints. As to whether I thought that was important, I don't do finger prints, I have nothing to do with them. Two bullets were handed to me by the solicitor, one in one bottle and the other one in the other, just now in court. I took one bullet out of the body. You ask me how many were given to me, and I ask you which are you referring to, when they first came

into my possession or just now when he handed them to me in court, then you state that you are not referring to him at all, but to me and my investigation, and ask how many bullets were handed to me and state that the gun was handed to me. One bullet was handed to me, and I recovered one bullet from the body in the original investigation. The bullet that was handed to me is the one that I made tests on for blood. I found human blood on it. There is no way to know how much, there was enough to make the test, I would say about 20 milligrams is required to make a test. I tested all that I could get off the bullet, I didn't weigh it, I can tell you how much was in my serum tube by the precipitate that I got. In my opinion it would make a difference whether that bullet went through a body, then went into some wood and then fell on the floor and then was picked up by someone and put [fol. 58] in his pocket and he handed it to another man and he handed it to another man, they all handled it and finally handed it to me. I still got the test of blood on it. It would still have blood on it, 20 milligrams. Getting to the paraffin test, as to what are some of the things you could do to make that test no good, of course the time would be one thing, after at most a week it would be gone; if you washed your hands thoroughly enough, and he only fired the gun once, possibly that would get rid of all the evidence. If you wash the hands thoroughly enough that would eliminate it; depending on how many times you fired the gun. If you take that gun and fire it, and are right-handed, and shoot that person up there as you indicate, there would be several ways that gunpowder would get on your left hand. This is an old gun, it has got what we call a lot of head space, if you look at it through here you can see that the distance between the cylinder and the barrel is considerable, so that a lot of powder sprays out, therefore, if this hand is anywhere near the front of the chamber, the front of the barrel, powder will spray out to the side and get on the other hand. If he had it in his pocket it would not still get on the hand, unless you smeared your hand over the gun after you fired it. If you take this gun, and this hand is down here, and you shoot somebody as you indicate, gunpowder is not going to get on this hand if you have it down there, it depends

on the position you are holding it, it has got to be fairly close. I have no way of knowing whether when Billy fired, he had a shotgun or revolver. I cannot tell by the bullet that I have here what kind of powder that shell had in it. I wouldn't know of my own knowledge, from any test that I made, whether it contained smokeless powder, but all powder contains nitrate. By your question, "A very small amount?" we are confusing smoke and nitrate. Answering your statement that we are talking about getting powder on the hands, most revolver ammunition has the black type powder. Supposing it had smokeless powder, it actually wouldn't make too much difference as to being apt to get powder on his hands; the particles probably would be smaller, but it would still have evidence, it would still show up. I told the solicitor that microscopically speaking, one of the bullets definitely [illegible] was fired from a 32-caliber gun, and the other bullet I am not certain, due to the condition of the bullet. The bullet that was removed from the body was badly mutilated. Everything that was on the bullet, all the markings that are left on the bullet that I removed from the body compared with the markings, the corresponding markings, on the test bullet that I fired, but I just don't feel in my own mind that there's enough markings left on the bullet that I recovered from the body absolutely to positively identify it as being fired from this particular old U. S. 32-caliber revolver. The only bullet that was taken out of the body I can only say it was fired from an old U.S. revolver, and that it was probably fired from that particular gun, but I am not swearing that it was fired from that gun.

Redirect examination.

But I will testify positively concerning the other bullet.

Recross examination.

You ask if I took those pictures. I was there when the photographer—I didn't study photography, that's why I had a photographer take them. Neither one was taken with ultra-violet; this one (indicating) was taken with infra-red. How I know, you notice the red numbers on the ruler,

it says one half, one quarter, three quarters, you don't see those, that's the same ruler and you don't see those on the picture; infra-red doesn't take pictures of red objects. I was there when the pictures were taken.

Pictures admitted in evidence.

Redirect examination.

In state's exhibit No. 12, this round circular darkened area is an area of very fine divided carbon particles. There is a bullet hole in the middle; that indicates that the gun was fired fairly close, within six inches or so. When you fire a gun close, the powder gets smaller, and as you back up, the powder gets wider and wider. If you move the gun two feet away from the garment, then the powder will be spread over like that, so the closer you get, the more the powder is contracted.

[fol. 60] Recross-examination.

It indicated that it was fired by a gun, not that it was fired by this gun.

Exhibits admitted in evidence, as follows:

Bullet identified by the doctor that had blood on it, handed to him by B. J. Cooper.

Shot identified by Dr. Howard as having been removed from the body of Luke Brown.

State's exhibits Nos. 7 and 9.

U.S. break-back type 32-caliber revolver with the number 68123 imbedded in the trigger guard.

Man's brown and beige and white sport shirt with hole in the back.

One pair men's overalls; trade name "Anvil, Hard to Beat."

Helen Cohran, sworn for the state, testified:

My name is Helen Cohran. I live at 142 East Broad Street. I lived at that address on the 17th of July this year. I have known Billy Ferguson about a year and have had occasion to go with him frequently during that time. He and I had planned to be married on the 17th of July.

I saw him at my home at seven-forty that morning. He came there riding in a Pontiac car, coming away from town, I didn't meet him at the front door, I was in the back, washing my hair, when he arrived. He came on in, he came through the kitchen. He made coffee for us. I went in the kitchen about ten minutes after he arrived and we drank the coffee. He told me that he had had the radio fixed in his car that morning. I asked him why he was there so early and he said he just woke up early. He didn't say what he had done before coming to my house that morning, nothing only having the radio fixed at Mr. Luke Brown's, he said. We made no plans at that time other than going to Villa Rica and getting a blood test. His manner and appearance while we were having the coffee was normal, nothing unusual. He showed no emotion whatsoever. I left my house with him about 8:15. We went to my mother's and were there about ten minutes, then I went by and got a pair of shoes and was there about five minutes, then went to Rose [fol. 61] Avenue in Douglasville. We went by Mrs. McLarty's. I stayed in the car and Billy got out and went to the door and talked to the girl there that came to the door; the lady that had the apartment was in Atlanta that morning. I know where the place is that Billy said he had his radio fixed; it is in Douglas County. After leaving Rose Avenue we went to Villa Rica to the hospital and got a blood test. After that we went to Waters Nursing Home and were there about ten minutes. Billy paid for the blood test at the hospital. I did not have an occasion to see how much money he had, if any. We were supposed to get the result of the blood test somewhere around 11:30. We didn't wait to get those results. We went and had a Coca-Cola that morning, and we left and was on our way back to Douglasville. Up to that time Billy had not shown any actions out of the ordinary, I hadn't noticed anything wrong with his actions. We then started back to Douglasville, and Mr. Cooper and Mr. Huckaby stopped us just above Rock Inn. I saw them when they passed, when we were going foward Atlanta, and I threw my hand up at them and it wasn't long till I heard the siren behind us, and they told Billy to stop and he pulled over and stopped. Mr. Huckaby and Mr. Cooper came

up to the car and Billy got out and they carried him and put him in the police car and Mr. Huckaby brought me on home. I saw him later that day. He called me from the courthouse, I recognized his voice on the telephone, that was about a quarter to twelve if I am not mistaken. He asked me if I would come up to town. That was an hour and a half after we were stopped out on the highway, it could have been longer. As a result of that phone call I came on up to town. I waited for quite a while, because he was still in the courthouse. They brought him across the street and carried him on back in the jail, and then I talked to him. I was waiting at the jail and he was in the courthouse. Luke Brown's place is toward Atlanta from my home, east. Douglasville is north of my home, I guess, which would be in the opposite direction from Luke's place. When they brought Billy from the courthouse on the afternoon of July 17 I had occasion to talk with him. In regard to his stating whether or not he expected the officers to pick him up, he told me he didn't [fol. 62] think we would ever get as far as Villa Rica when we left that morning.

Cross-examination.

You have talked to me before and I have talked to you. I remember you asking me a lot of questions, I don't remember when, it was a considerable length of time ago. My mind about Billy and about this case should have been fresher then than it is now. I remember you asking me did Billy act any different that morning. I told you that he did not. I remember you asking me did Billy do or say anything that gave me any idea that he might have been connected with this crime. I told you no. Regarding my present statement that he told me that he was expecting to be picked up by the police, I thought you meant before they picked us up that morning. You said "in the morning," and it was in the afternoon that he said that. When you and your secretary interviewed me and you said to me, "Did Billy do or say anything that day that made a sign to you that he had been in any difficulty," you said "that morning." You asked me did he arrive at my house that morning and did he act any different that morning. He didn't act any different that morning. To state exactly

what Billy said about the police picking him up, he told me that he didn't think we would ever get as far as Villa Rica when we left Douglasville that morning." He didn't tell me that before we left, he told me that when I talked to him at the jail house, he said, "I did not think we would get as far as Villa Rica when we left." You ask if he said something like this: "I didn't think we would get to Villa Rica because I murdered a man and the police were after me." No, he didn't say anything like that; the police wasn't after him because they already had him. He said "I didn't think we would get as far as Villa Rica when we left Douglasville." That was the extent of that particular talk. He didn't say the car wouldn't hold up or anything else, he didn't mention any reason. We were planning to get married that day. I had been going with him approximately a year. I have three children. He knew that, and we were going to get married. There was conversation between us on our plans of taking a trip; we were going to Florida. He told me he had enough money to [fol. 63] go to Florida, he said he could afford it. He didn't tell me that on the way to Villa Rica, he told me that before, so therefore I presume he must have had a little money. I didn't have any money saved up for the marriage. I did not tell anybody that I had $125 saved. All the time that I was with him that day, up until the police stopped him, he didn't act any differently at all than he had for the year that I had been going with him. He didn't act scared or excited, he acted the way that he had acted for the year that I had been going with him. When the police stopped the car they had Billy get in the deputy sheriff's car. I stayed in his car and Mr. Huckaby drove it back to town. When he got to Douglasville with me he put me in the police car and carried me home. He didn't ask me a lot of questions; I was asking him questions. They didn't take me to jail and interrogate me over there after they carried me home. They took Billy over here to the jail. I don't know any reason why they didn't take me over there. The chief of police said my mother was upset and I needed to go home. He said he didn't want me to talk to Billy. None of the sheriffs, deputy sheriffs or policemen at that time interrogated me, "Did you and Billy murder a man out here?". Two hours after the alleged

murder took place Billy and I were found in an automobile. Deputy Sheriff Cooper told Billy when he pulled up alongside the car and stopped his automobile that he wanted to ask him some questions about where he had been that morning. He didn't say he wanted to ask me any questions, nor did the sheriff want to ask me any questions.

Redirect examination.

When I talked to Billy that afternoon at the jail, that was in the presence of Mr. Cooper. As to whether Billy made any statement to me at that time as to what had happened at Luke Brown's that morning, he just told me that he killed him. I asked why he killed him. He told me he didn't know. I asked him whether or not he did it for money—I didn't exactly ask him that, I just told him he didn't need his money, and he said he did. I asked him whether or not he had planned it. His reply to that was no. He stated whether or not he knew that he had money.

[fol. 64] Recross-examination.

You ask if I am trying to say on the stand here that he told me he committed a crime out here. That's what he told me. That is what I am saying. Why I didn't tell you when you interviewed me a week or so after that, what was I afraid of, am I afraid of somebody, you didn't ask me if he told me that. You asked me if I knew that he had anything to do with it. I didn't know. I am not afraid of being implicated in this crime. I know that Billy sits over there with his life at stake. I know it is a very serious thing. I would not want to tell this jury anything at all that would give them the wrong impression about this case. He did tell me that he killed Mr. Brown, he said he was going to tell me all the time, he said that in the presence of Mr. Cooper, Mr. Cooper heard that, he said he thought he should be the one to tell me. By that he meant that he should be the one that told me that he killed Mr. Brown. You ask me this question: "Don't you believe that a girl who was engaged to Billy, who was going to marry him, if you were that close to a man, or boy, he is only a boy, if you were going to marry him and he would be more or less the father of your children, do you believe he would have gone with you to Villa Rica and never said a word to

you whatsoever, and later on, when he was in jail, he told you something, and now you say he said, 'I was going to tell you all the time' "?. My answer to that question is, He did. You ask if I believe, knowing him like I did for a year, that he would do that of his own volition, that he wouldn't tell me on the way to Villa Rica that day. He told me he wanted to tell me that morning when he first came up there, but he couldn't. He didn't act scared when he told me that, he acted perfectly calm, not as if he was crazy, no different from what he had ever acted. You ask me this question: "And yet, a few hours after he was in jail he said to you, 'Well, I killed a man, I was going to tell you about it all the time,' and you think that's just the normal way he acted all the time you have known him?" My answer is, I couldn't tell any difference in his actions at all. I did not know Mr. Brown, I of course never went out with him. I was in his place once, with my daddy. I didn't know him, I sat in the car, I wouldn't have known [fol. 65] him if I had seen him. I have never been in his place of business. I was not in his place of business that morning. Certainly I am not the one who murdered him. I certainly did not do it. You ask if I can assign any proof that I didn't do it. I was at home that morning, I was not even dressed when Billy came after me. I am 26 years old. It didn't strike me as funny that I and the boy that I was about to marry were out here on the highway, coming back to Douglasville, a comparatively small town, not a large city where you could get lost, we come right back into the main town and we didn't do anything except go for a blood count, that boy just got through murdering a man out here and I didn't have anything at all to do with it. He never discussed it with me in any way. The way it was, he waited till he was locked up in jail and then he said to me, "Yes, I murdered a man this morning, I was going to tell you all the time." I wasn't in it with him. When you interviewed me, you asked me to tell you the truth about this thing, and I told you the truth. You just wanted the truth about what I knew about it. As to my not having told you one word about what I am saying on the stand today, you didn't ask me, I answered what you asked me. You didn't ask me if he killed a man, or if he said he did. When you asked me did I think he did it, I said

I just couldn't believe it. What we were talking about was a murder, not a game of some kind. I was at liberty at my place, we sat down and talked, I wasn't in any hurry. Your saying, "I want to find out all about this case, I am Billy's attorney and I came to ask you all about it" was an indication to me that you wanted to know all about it. Regarding your saying that it seems strange to you that I say that you didn't ask me specifically, you did not.

J. B. Cooper, re-introduced for the state, testified:

All the information that I testified about yesterday about going down to this place east of Douglasville and finding the body and all the other things I have testified to, occurred in Douglas County, Georgia.

[fol. 66] Cross-examination.

I have been in court. I heard Helen Cohran testify. Billy Ferguson didn't say he murdered Mr. Brown, he said, "I did it." She asked him, "Billy, did you do it?" and he said "Yes, I did." She asked him, "Why did you do it?" That was not on the porch, it was back there in the runaround on the outside of the cells. I was the only one there besides Helen. I did not threaten Billy. I did not beat him up. I did not tell him I would. Billy asked me when we left the sheriff's office over here, going over to the jail, after he signed the statement, if I would let him tell Helen about it himself instead of someone else telling her. I said "Yes, I will let you tell her if you want to." She was sitting on the porch at the jail then, and he told her, he told her after the signed statement was made, that was when the conversation took place between Helen and Billy, late in the afternoon.

Redirect examination.

You ask if I would like to finish, that I started to answer the question and said she asked Billy why he did it and he interrupted me. She asked Billy why he did it, and he said "I just did it." She asked him "Did you do it because you needed the money, we could have got the money somewhere," and he said, "I don't know, I did it."

Recross-examination.

You ask if in any case where I know that a person is in a certain automobile, I know the person and they are wanted for murder, if could be anybody, I apprehend it on the highway and there is another person in the car, do I say, "This is the man that did it, you didn't have anything to do with it, you go on home, we will just take this man to jail," is that my procedure, I myself? No, that was not my procedure. I didn't know that Billy Ferguson did it at that time. I wanted to talk to Billy, I wanted to ask him where he was at that time, because Billy was the person seen at Mr. Brown's place of business. As to whether I thought that maybe this girl that was sitting in the car might know something about it, maybe she saw [fol. 67] somebody down there, I didn't know anything about Mrs. Cohran, because I hadn't seen her around there. I didn't see Billy but I had been told that he was there. That's why I wanted to talk to Billy. I knew her before. I have never had anything to do with her, nor has Officer Huckaby to my knowledge. I don't know how well he knows her. How come him to get in the car and drive it, I asked him to take Mrs. Cohran back in Billy's car. I don't know if I said to take her home, I don't remember whether it was discussed where we would take her, just take her back. I wanted to see Billy and talk to him. I didn't know about that, whether anybody had related to me that her mother needed her at home. I know she lived with her mother. No word had gotten to me that her mother needed her and she should go home.

T. A. Smith, sworn for the state, testified:

My name is T. A. Smith. I live in DeKalb County, Chamblee. I am employed by the State of Georgia, Georgia Bureau of Investigation. I am an agent with the rank of lieutenant. I have been employed by the Georgia Bureau of Investigation since 1948. I was in uniform with the Georgia State Patrol since 1941, with the exception of service in the Navy. I have had approximately 16 years' experience as a law-enforcement officer. Douglas County, Georgia is within the jurisdiction assigned to me as agent of the Georgia Bureau of Investigation. I have been com-

ing out to Douglas County since 1948 I believe, since I was assigned to the Georgia Bureau of Investigation. I had occasion to come to Douglasville on or about the 17th of July, in response to a call. I arrived in Douglasville at approximately 1:30, coming to the sheriff's office in the county jail. I assisted in the investigation of a shooting down at Mr. Brown's TV repair shop. My investigation consisted of a search of the room of one Billy Ferguson, at the home of Mrs. McLarty, in company with the deputy sheriff and I believe Chief Huckaby and Denver Gaston. I and the other two gentlemen made that search, we made it about 3:30 in the afternoon. The search consisted of Agent Gaston locating a revolver and a billfold in the attic of the closet in Billy Ferguson's room. I had not had occa-
[fol. 68] sion to talk with Billy Ferguson prior to making that search, I didn't talk with him. Agent Gaston found that in my presence. When he found it I was standing there a chair for him to get on, and he was standing on the chair, reaching up in the hole in the ceiling. I saw the articles that he found in the attic. I can identify the billfold with some articles in it that you hand me. This is the billfold that Agent Gaston found in the attic of the room of Billy Ferguson. I can identify the revolver type U.S. pistol with the number 68123 imbedded in the trigger guard that you hand me, I have seen it before. Agent Gaston got it out of the attic of the room of Billy Ferguson, along with that billfold. At the time he found the billfold it had contents consisting of a driver's license issued to Luke A. Brown, and some insurance cards of Luke A. Brown, and a peace officer's card issued to Mr. Brown, and other items. When that gun was found, it was partially loaded, there were three fired hulls in it and two live cartridges. After finding these articles we returned to the Douglas County courthouse, at which time I talked to Billy Homer Ferguson and exhibited to him the articles that we had found in the attic of his room. In response to exhibiting these articles to him he made a statement to me. Nothing was offered him in return for making that statement. It was not induced by me or by anyone in my presence by threat of bodily harm. It was freely and voluntarily made. I showed him the gun and asked him if he wanted to make a statement. He said he

wanted to make a statement. I told him if he wanted to make a statement we would be glad to listen to him, but that he didn't have to make a statement unless he wanted to, but that any statement he might make might be used against him in court, and also asked him if he would like to have counsel or an attorney, and he said he didn't need it, and when confronted with the revolver he admitted that that was the revolver that he had used to shoot Luke Brown that morning, that it was the same revolver that he had hid in the attic of his room. The billfold he identified as being the one that he had removed from the body of Luke Brown after shooting him and hiding it in the attic of his room. That statement was reduced to writing. I have it with me. It has been in my possession since [fol. 69] July 17, 1958. It is the same statement that he made at that time. It has not been altered in any way whatsoever. I can identify the ten sheets of paper, marked state's exhibit No. 20, as being the statement made by Billy Homer Ferguson and taken down by myself. I read the statement to him and handed it to him and asked him to read it. I asked him if the statement was true and correct and he said it was. I asked him if he wanted to sign it and he said he would be glad to, and did, and also wrote on the bottom of the statement that he had read it and initialed each page with "B.F." That is the statement that he signed. It was given in the presence of Deputy Sheriff Rainwater, Deputy Sheriff Cooper, Chief Huckaby, and myself. This is the gun that I handed to him, it is the pistol referred to in the statement that was made to me. In the room identified as being Billy Ferguson's was clothes with Billy Ferguson 's name on them in the closet, there was also a Navy badge in the closet with the name of B. H. Ferguson on it, and a serial number on it.

Cross-examination.

I am Mr. T. A. Smith. I have been with the Georgia Bureau of Investigation since 1948. Before that I was with the uniformed division of the state patrol. I have had special training in criminal investigation. I spent three months at the Federal Bureau of Investgation Academy in Washington, that was in '51 I believe. The course that I took up there was a general course in investi-

gative work, technique, it was more or less a general course in policing. They stressed getting evidence, legal evidence, the methods that they use. I think the Georgia Bureau of Investigation is well equipped with facilities to determine all the things pertaining to crime; it is my opinion that we have one of the best equipped state laboratories in the United States. I would say that it costs the State of Georgia a considerable amount of money to have all that equipment. I came into possession of this gun from Denver Gaston, I was with him, Agent J. D. Gaston. He got the gun from the attic of the room of Billy Ferguson. I was right there when they got it down. Mrs. McLarty said that Billy had one room, [fol. 70] a bed room. He had a closet that I presume was a clothes closet, that's what it was being used for. As well as I remember it was square, just guessing I would say it was about four feet on each side. It was an old type tw--story building, with a high ceiling, I would guess nine or ten feet high, about the same height as the closet I would say. Mr. Gaston searched the closet itself. I was with him, and Mr. Huckaby, the three of us, along with Mrs. McLarty, she was in the room all the time I was in there. All of us did the searching except Mrs. McLarty, she was there with us at all times. In the bed room, the main room, we looked at the usual places that you usually keep things in, in the drawers, among the quilts, under the bed. I was there only one time. Someone, I don't remember who, told me the place had been searched before. I am not stationed in Douglasville. I was called to come over here about 11 or 11:30 in the morning. When I first arrived here I came to the jail and talked with Mr. Rainwater and Mr. Cooper and Mr. Huckaby and Mr. Gaston. I did not talk to the defendant at that time. After I talked to these gentlemen, Mr. Gaston and Mr. Huckaby and I went down to Mrs. McLarty's. In the course of the conversation that I had with the officers I was informed that there had been a search, I don't know what time it was. It could have been both my idea and Mr. Gaston's idea to go and re-search the place, I don't remember. What prompted me to do that after I had known that it had been searched, it never hurts to look again into anything. Nobody had tipped me off of something that

I might find. I didn't go there with it in mind that maybe because I was more thorough or had better technique, I might find it when the other officers couldn't. J. D. Gaston actually found what was found in the attic. How he found it, he was standing up on a chair and reached into the ceiling through the opening. I was right there when he did that. The first time he stuck his hand up there he didn't get up high enough to look around. I don't remember whether he found the gun first or the wallet. After he found that, he put his hands back up there again and probed around. I did not tell him to be careful, that whatever was up there I might want to preserve the finger prints; he had been to the same academy [fol. 71] that I went to, he had the same training that I had had, and I would say he knows as much or more than I do about that. I am a lieutenant, he is just an agent, which more or less in a way makes me his superior officer, so if I tell him to do so and so I presume he would pay attention to me. You ask if in all my experience, in going to the FBI school and in my experience, or even watching television shows, I think it is a good policy to pick up something like that and smear all over it, or that it is better to pick it up with a pencil or something. Well, it would be better to pick it up with something. First he found something, then he went back up there probing some more. He didn't say, "I have found something, let's get up there and look for something else" and take a flashlight and then pick up whatever else he found in a scientific manner, and I didn't tell him to. You ask if it wouldn't be much better in the course of my investigation, when I come into court where a man's life is at stake, and I had twelve people sitting there, to be able to say, "We lifted the defendant's finger prints off the wallet," and if that isn't the object of finger prints. Well, let me say this, when we confronted the defendant with this gun, he admitted that this was the gun that he shot Mr. Brown with, and was the gun that he placed in the attic at his room at Mrs. McLarty's, so even if there was a blunder made in not trying to preserve finger prints, and let me say this, I doubt seriously if finger prints could be taken from a piece of material of this type. I have been with the Bureau ten years. I have

had finger prints taken off of glass. This (indicating) is smooth wood. If you do like this (indicating), a finger-print man couldn't get it off the wood, the surface is too small, and the type of material. Part of this is as small as that piece of wire, if you will notice, the finger chart is as small as that piece of wire. I did not get finger prints off of the object that you present to me, I am not a finger-print expert, but this is leather and it is porous. In my opinion you couldn't get finger prints off of leather, that is my opinion, I am not a finger-print expert. It is not true that in my opinion the fact that a person who has been arrested and put in jail says, "Yes, that's my gun, I did this, yes, I did that," eliminates any further investigation on my part as a GBI agent. As to whether [fol. 72] that is what I told the jury, I did tell them that he said that was the gun that he shot Mr. Brown with. Whether it is true that I therefore didn't think it was advisable to look for finger prints, in my opinion we couldn't have taken them off. I did not participate in the firing of that gun or those bullets, I know nothing about that. I don't know how many other murder cases I have worked on as a GBI agent, nor how many cases I have worked on that involved a gun. I would say more than ten, I would not say more than twenty-five. I have tried to take finger prints off of a weapon or have them taken. I have picked up a weapon carefully and taken it to the finger-print man, until I found that it was almost impossible to do that. I have never gotten finger prints off of a gun. I have gotten smeared finger prints off of one, you can get smears, but they have to be readable before they are any good. I have tried weapons and we would get smears, but I don't know whether this one had any smears at all. I testified to the solicitor that this was the gun, I can remember that that was the gun. I identify it by the serial number, 68123, and by the marks on the butt of the gun. If you told me the number was 68128 you would be wrong. This is not an "8," it is a "3." I was here yesterday, in the witness room. I did not hear the testimony in this court. The last time I had that gun in my hand or looked at it I believe was Monday a week ago. I have not been on vacation since Monday a week ago, I have been doing investigating work on other cases,

not having to do with guns, there could have been license plates involved, but I believe nothing to do with any weapon of any kind or stolen articles that had serial numbers on them. I don't believe I have worked on a license plate since Monday was a week ago. The last time I had anything to do with any gun was Monday was a week ago I believe, that was this gun. I don't remember any other gun. This crime happened July 17. Last Monday was September 22, that's over two months since the crime. What I was doing last week with the gun, I picked it up at the crime lab and brought it to Sheriff Redding, for use in court, I mean a week ago this past Monday. I presume that the idea of having it over here so soon was that he wanted it for the grand jury. I didn't ask any questions. I made [fol. 73] a note of the serial number when Mr. Gaston found it. The last time I looked at the serial number was yesterday I believe, I looked at it to refresh my memory. I remembered the serial number of that gun by looking at my note yesterday, until today. You ask if I can testify that that gun that I have in my possession ever killed anybody. I can testify that Billy Ferguson said he killed Luke Brown with this gun. Outside of what Billy or somebody else told me, I don't know of my own knowledge that that gun ever killed anybody or that it ever belonged to Luke Brown.

Redirect examination.

I assisted in the investigation of this case. I was the senior man from the Department of Public Safety present at the investigation, and my investigation disclosed that a man was killed with that gun and who owned the gun. The man between the two ladies there, in the white shirt, is the man that I talked with on the afternoon of July 17 and exhibited to him that gun and billfold and he identified it.

Recross-examination.

I have answered you that I don't know of my own knowledge that that gun ever killed anybody. Through the investigation we found that the gun belonged to the deceased man, Brown, partly by what Billy told me. Of my own personal knowledge I didn't know Mr. Brown, and I don't know that he owned the gun, and the same thing about

the gun ever murdering anybody, eliminating what Billy told me, I don't know it of my own knowledge. I was present when he made what you term this alleged confession, the document of some pages here. I heard everything that was said while I was talking to him, when he made the confession. When Mr. Gaston and I came back with this gun and that wallet we asked him if he knew anything about this gun, we confronted him with the gun, and he admitted that this was the gun that he got at the radio TV repair shop and shot Mr. Brown with it and took it to his room at Mrs. McLarty's and hid it. It is not true that when we came in, I or someone else said, "We found this gun and this wallet where you live and it will be better [fol. 74] for you to tell the truth about it. As to whether someone else said that, I didn't hear it, it was not said in my presence. I was there. I didn't hear "Billy, we have found this gun and this wallet where you live and it will be better for you to tell the whole story." You ask if we just walked in and said "We found the gun," and he said, "Oh, yes, that's the gun I shot him with." It was almost like that.

OFFER IN EVIDENCE

State's exhibit No. 20, identified as being a statement made by the defendant, introduced and admitted in evidence, as follows:

July 17, 1958.

4:10 P.M. Douglas County Court House Douglasville, Ga. Sheriff's Office. Statement of Billy Homer Ferguson, age 19, birth date Sept. 12, 1938, address 15 Church St., Mrs. McLarty rooming house, Douglasville, Ga.

I Billy Homer Ferguson make this statement of my own free will I have been advised of my rights that I do not have to make a statement of any kind that any statement I do make can be used against me in court. There have been no threats of bodily harm made and no promise of any reward of any kind. This statement is made in the presence of Dept. Sheriff J. B. Cooper, Chief H. B. Huckaba, J. C. Hicks, Douglasville City police, & J. D. Gaston and T. A. Smith, Ga. Bureau of Investigation, on July 17, 1958. at approximately 5:30 A.M. I got up from my bed in Mrs. McLarty rooming house and went down to the Douglasville

Gift Shop located on 78 Highway just east of Douglasville. This gift shop and radio and television repair shop was operated by a fellow I knew as Brown. When I got to his place this morning I had to wait for him to get to the shop. I believe he arrived about 6:30 A.M. Brown was going to repair my radio in my car. He told me to take the radio out of my car and bring it in. He helped me take it out. Before we got the radio out two boys came by one of them I knew as Billy Jackson. I did not know the other one. They left for about 5 or 10 minutes. After they left Brown helped me take the radio out of my car and took it inside the place. [fol. 75] Brown repaired the radio. The two of us put it back in the car. While we were working on putting it in I went inside to get a screwdriver. While in there I saw Brown's gun (pistol) hanging on a nail in the corner of the workshop. I put the pistol in my pocket and went out back to the car and we finished putting the radio in my car. Then we both went into the shop. Brown walked over to the adding machine, he had his back to me. I took his pistol out of my pocket and aimed at him I shot him in the back. When I shot him he fell on his back. He mumbled something that I couldn't understand. Then I shot him twice more. Then I unzipped the pocket of his overalls and took his bill fold out. I put the gun and bill fold in my pocket, got in my car and drove back to my room at Mrs. McLarty's. I took several ten dollar bills out of the bill fold and put them in my pocket. I hid the gun and bill fold with the rest of the money in it in the attic of the closet to my room. I then went to my girl's house, Helen Graham and we then went to see about an apartment at Mrs. Thorgerson's on Rose Avenue. Then we went to Villa Rica to the hospital and had a blood test. We were on the way back to Douglasville and had gotten to White City when Dept. Sheriff Cooper and Chief Huckeba stopped us and brought me to jail in Douglasville. The gun that was shown me by T. A. Smith is the same gun that I shot Brown with and the same one that I hid in the attic at Mrs. McLarty's. The bill fold is the same bill fold that I took out of Brown's pocket when I shot him and the same one that I hid in the attic at my room in Mrs. McLarty's rooming house. The above statement is true and correct. I have read it.

Billy Homer Ferguson.

Witnesses: T. A. Smith, GBI, J. B. Cooper, J. C. Hicks, J. D. Gaston, GBI, H. R. Huckeba.

State rests.

Billy Ferguson, called to the witness stand:

My name is Billy Ferguson.

Defendant rests.

[fol. 76] Order of Approval—December 19, 1958

The within and foregoing pages numbered 1 to 54 are hereby approved by the court as a correct and complete brief of the evidence adduced upon the trial of the above-styled case.

Let the same be filed and become a part of the record in said case.

This 19th day of December, 1958.

W. A. Foster, Jr., J. S. C. T. C.

[File endorsement omitted.]

[fol. 77] In the Superior Court of Douglas County

[Title omitted]

Verdict—September 25, 1958

Whereupon it is considered, ordered and adjudged by the Court that the defendant, Billy Ferguson, be taken from the bar of this court to the common jail of Douglas County, Georgia, and there by the sheriff safely kept until he is transferred as provided by law to within the walls of the State Penitentiary, at Reidsville, Georgia, where he shall suffer punishment by death by electrocution on the 7th day of November, 1958, as provided by law, between the hours of 10:00 A.M. and 2:00 P.M.

If the condemned person so desires, there may be present

at such execution his counsel, relatives and such clergymen and friends as he may designate.

In open court, this 25th day of September, 1958.

W. A. Foster, Jr., Judge Superior Court, Tallapoosa Circuit.

Robert J. Noland, Solicitor General, Tallapoosa Circuit.

[fol. 78] CLERK'S CERTIFICATE

Clerk's Office, Superior Court of Douglas County, Ga.

I Hereby Certify, That the foregoing pages, hereto attached, contain a true and complete transcript of such parts of the record as are specified in the bill of exceptions and required by the order of the Presiding Judge, to be sent to the Supreme Court in the case of Billy Ferguson, plaintiff in error, vs. The State, Defendant in error.

I Further Certify, That an exact duplicate of this transcript, numbered in exact acordance with the numbering of the pages of the original transcript of record transmitted to the Supreme Court, has been made and retained in this office; That the — Term of said Court, at which said case was tried, adjourned — 19—. All of which appears from the Records and Minutes of said Court. Witness my signature and the seal of said Court, affixed this the 5th day of March, 1959.

F. M. Winn, Clerk.

[Seal]

[fol. 79] [Endorsed:] Case No. 20446. Supreme Court of Georgia, April Term, 1959. Billie Ferguson versus The State. Transcript of Record. Filed in office Mar. 9, 1959. Henry H. Cobb, D.C.S.C. Ga.

[fol. 80] IN SUPREME COURT OF GEORGIA

20446

BILLY FERGUSON

v.

THE STATE

ORDER DIRECTING TRANSMITTAL OF COPY OF APPROVED BRIEF OF EVIDENCE, ETC.—May 19, 1959

The Clerk of the Superior Court of Douglas County is hereby directed to transmit to this court without delay, a properly certified copy of the approved brief of evidence adduced at the hearing of the motion for a new trial held on January 25, 1959, if the same be of file. If it be not of file, let the said clerk certify to that fact.

Let a copy of this order be mailed to counsel for each side.

[fol. 81] IN THE SUPERIOR COURT OF DOUGLAS COUNTY

[Title omitted]

CLERK'S CERTIFICATE RE APPROVED BRIEF OF EVIDENCE, ETC.

GEORGIA, DOUGLAS COUNTY.

Office of Clerk Superior Court:

I, F. M. Winn, Clerk of the Superior Court in and for said County, do hereby certify that no approved brief of the evidence adduced at the hearing of the motion for new trial in said case has been filed in this court,

I certify further that there is of file a report of the evidence adduced at said hearing, including the depositions, and the counter showing of the State. The report of the evidence being filed on January 5, 1959, and the counter showing on January 22, 1959.

Witness my official signature and the seal of said Court, this the 22nd day of May, 1959.

(Signed) F. M. WINN, Clerk. [Seal.]

Filed in office May 25, 1959. (Signed) Henry H. Cobb, D. C. S. C. Ga. Case No. 20446. Supreme Court of Georgia.

[fol. 82] IN THE SUPREME COURT OF GEORGIA

Case No. 20446

FERGUSON

v.

THE STATE

OPINION—Decided May 8, 1959

By the Court:

Hawkins, Justice. Billy Ferguson was convicted in Douglas Superior Court of murder, without a recommendation, and sentenced to death by electrocution. The record discloses that, on July 17, 1958, at about 7:30 o'clock a.m., the defendant went to the place of business of Luke A. Brown and employed him to repair the radio in the defendant's automobile; that while there he took a pistol hanging on a nail in Brown's place of business and put it in his pocket; that, after Brown replaced the radio in the defendant's car, he returned to the inside of his place of business, where the defendant shot him in the back with Brown's own pistol; that Brown fell to the floor and the defendant shot him twice more, took Brown's billfold from his pocket, placed both the billfold and pistol in the defendant's own pocket, and later hid them in the attic over a closet in the place where he resided, where they were found by the police officers. The defendant was taken into custody between 10 and 11 o'clock in the morning on July 17, 1958, and was carried to the courthouse and jail, and about 4 o'clock in the afternoon he freely and voluntarily made and signed a written confession, after being advised by the officers that he did not have to make a statement unless he wanted to; that any statement he might make might be used against him in court, and upon being asked if he would like to have counsel or an attorney,

stated he didn't need it. The verdict of guilty was returned by the jury on September 25, 1958. The defendant duly filed his motion for a new trial, containing the general grounds and five grounds, and to the judgment denying the motion as amended he excepts. Held:

1. The evidence amply supports the verdict, and the general grounds of the motion for a new trial are without merit.

2. The first special ground for the motion for a new trial, complaining of the admission in evidence of a described [fol. 83] pistol as the alleged murder weapon, upon the ground that there was no evidence or testimony that positively identified the weapon as being the gun from which the fatal bullet was fired, is without any merit whatsoever. The pistol was not only positively identified by the testimony of several witnesses, among them the officers who found it at the place where the defendant said he placed it, but also by the testimony of the officers that, when the pistol was shown to the defendant, he stated that it was the pistol he used to shoot Luke Brown that morning. Williams v. State, 210 Ga. 207 (4) (78 S. E. 2d 521).

3. Special ground 2 shows, that when the defendant was called to the witness stand, his counsel propounded to him the following questions: "Q. Your name is Billy Ferguson? A. Yes, sir. Q. Let me ask you, have you murdered anybody?" The solicitor-general then objected upon the ground, "That is highly irregular and improper. There is no authority for counsel questioning the witness." Thereupon counsel for the defendant insisted that to deny the defendant the right to have his counsel question him violated the defendant's right to have the benefit and assistance of counsel, as guaranteed by articles VI and XIV of the Constitution of the United States (Code §§ 1-806 and 1-815), and by art. 1, sec. 1, par. 5 of the Constitution of Georgia) Code, Ann., § 2-105), and thereupon the trial judge ruled: "However logical your argument may be, I am compelled to hold that you do not have the right to do anything more than instruct your client as to his rights, and that you have no right to question him on direct examination." It is insisted that this ruling by the trial judge was violative of the constitutional provisions above

referred to, and that this ruling and colloquy in the presence of the jury, without the court upon its own volition having the jury removed from the courtroom, was erroneous, highly prejudicial and harmful to the defendant. Held:

(a) Article VI of the Constitution of the United States (Code § 1-806) has no application to prosecutions in State courts. Wilburn v. State, 141 Ga. 510 (2b) (81 S. E. 444); [fol. 84] Moore v. State, 151 Ga. 648 (108 S. E. 47).

(b) The constitutional provisions granting to persons charged with crime the benefit and assistance of counsel confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel. It has been repeatedly held by this court that counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury. Code § 38-415; Corbin v. State, 212 Ga. 231 (7) (91 S. E. 2d 764, 351 U. S. 987, 76 S. Ct. 1057, 100 L. Ed. 1501), and cases there cited.

(c) It was not error for the court to fail to exclude the jury during the colloquy and ruling here complained of.

4. The third special ground of the motion for new trial excepts to the admission in evidence of the written confession of the defendant. There was evidence that this confession, at the time and place and under the circumstances detailed in the foregoing statement of facts, was freely and voluntarily made, without being induced by another, by the slightest hope of benefit or remotest fear of injury, and the trial judge in his charge left to the jury the question of whether or not it was so made, with instructions to disregard it if it was not. That the confession was made while the defendant was in custody and prior to indictment, and before any warrant was issued or formal charge was made against the defendant, or the fact that the defendant was not thereafter carried before an officer authorized to receive an affidavit and issue a warrant within the time prescribed by the act of 1956 (Ga. L. 1956, p. 796; Code, Ann., § 27-212), would not render the confession inadmissible. Code § 38-411; Wilburn v. State,

141 Ga. 510 (5), supra; Downs v. State, 208 Ga. 619 (68 S. E. 2d 568); Williams v. State, 208 Ga. 704 (69 S. E. 2d 199). The fact that a defendant might be illegally detained at the time of making a statement does not render [fol. 85] it inadmissible in a State court. Stein v. New York, 346 U. S. 156 (2d) (73 S. Ct. 1077, 97 L. Ed. 1522).

(a) The decisions of the Supreme Court of the United States in McNabb v. United States, 318 U. S. 332 (63 S. Ct. 608, 87 L. Ed. 819), and Mallory v. United States, 354 U. S. 449 (77 S. Ct. 1356, 1 L. Ed. 2d 1479), relied on by counsel for the defendant, deal with Federal rules of criminal procedure applicable to trials of criminal cases in the Federal courts and have no application here.

5. In special ground 4 of the motion for new trial, the movant contends that a named juror was disqualified to serve as such because related to the solicitor-general within the third degree, and in special ground 5 it is contended that two or more named jurors were disqualified to serve because of prejudice and bias against the defendant. Held:

(a) The solicitor-general in the prosecution and trial of a criminal case is acting in an official capacity as an officer of the court, and is not such a "party interested in the result of the case or matter" as that relationship to him would disqualify a juror to serve in a criminal case. Code § 59-716.

(b) Whether or not the affidavits of the defendant and his counsel in support of these grounds are sufficient as to their lack of knowledge of such alleged disqualifications and of their inability to discover this by the exercise of proper diligence, the order and judgment of the trial court denying the motion recites that, when the motion came on for a hearing on December 19, 1958, both parties thereto requested additional time in which to submit additional evidence and written arguments thereon, which was duly granted by the court, allowing all parties until January 25, 1959, in which to submit further evidence and argument; and "after review of additional evidence submitted in behalf of both parties, the court finds as a matter of fact" that counsel for the defendant did not inquire of the jurors at the time they were being examined, "Are you

related to the solicitor or to any one in his office or anyone around the table?" and that the evidence adduced on the hearing of the motion failed to show the existence of any [fol. 86] bias or prejudice on the part of any jurors sworn to try said case. The record contains none of the evidence adduced upon the hearing of the motion on January 25, 1959, and this court has no way of determining whether or not the trial judge abused his discretion in overruling these grounds of the motion for new trial. Hall v. State, 141 Ga. 7 (80 S. E. 307); Tolie v. State, 184 Ga. 518 (192 S. E. 35); Kennedy v. State, 191 Ga. 22 (6) (11 S. E. 2d 179); Verdery v. Campbell, 203 Ga. 211 (46 S. E. 2d 66); Butts v. State, 211 Ga. 16 (83 S. E. 2d 610).

6. It was not error for any reason assigned to deny the motion for a new trial as amended.

Judgment affirmed. All the Justices concur.

IN SUPREME COURT OF GEORGIA

ORDER DENYING MOTION FOR REHEARING

In paragraph 3 of the motion for rehearing counsel for the plaintiff in error cited the case of Northwest Atlanta Bank v. Zec, 196 Ga. 114 (26 S. E. 2d 183), wherein this court held that, in compliance with Code § 6-810, it would order the clerk of the trial court to certify and send up to this court any additional record in the trial court where it appeared from argument of counsel or in consideration of the case that there was such record and that it was necessary in order fully and fairly to adjudicate the questions in issue; and requested this court to have certified and transmitted to this court the evidence adduced upon the hearing of the motion for a new trial in support of grounds 4 and 5 thereof. In response to such an order issued by this court, the clerk of the trial court certified that "no approved brief of the evidence adduced at the hearing of the motion for new trial in said case has been filed in this court." While the certificate further discloses that there is of file a report of the evidence, [fol. 87] depositions, and counter-showing of the State, it

is not made to appear that the report of evidence has been properly briefed (Evans v. Anderson, 214 Ga. 828, 108 S. E. 2d 268), or that it, the depositions, or counter-showing by the State have been approved by the judge so as to become a part of the record which could be transmitted by the clerk to this court, and they cannot now, since certification of the bill of exceptions, be made a part of the record. Glover v. State, 128 Ga. 1 (3) (57 S. E. 101); Sasser v. State, 129 Ga. 541 (13, 14) (59 S. E. 255). Hence, no reversal of the judgment of the court below overruling these grounds of the motion for a new trial is legally possible. Code (Ann.) §§ 6-801-6-803; Morrison v. Dodge, 94 Ga. 730 (20 S. E. 422); Epps v. Miller, 127 Ga. 118 (1) (56 S. E. 123); Summerlin v. State, 130 Ga. 791 (61 S. E. 849); Leathers v. Leathers, 132 Ga. 211 (63 S. E. 1118); Pharr v. Davis, 133 Ga. 759 (66 S. E. 917); Caldwell v. Sturdivant, 155 Ga. 590 (118 S. E. 39); Attaway v. Duncan, 206 Ga. 230 (56 S. E. 2d 269).

Motion for rehearing denied.

[fol. 88] IN SUPREME COURT OF GEORGIA

20446

BILLY FERGUSON

v.

THE STATE

JUDGMENT—May 8, 1959

This case came before this court upon a writ of error from the Superior Court of Douglas County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of costs, $15.00.

[fol. 89] IN THE SUPREME COURT OF GEORGIA

Case No. 20446

[Title omitted]

MOTION FOR REHEARING

Now comes the defendant in error, and before the transmittal to the Court Below, and within the time allowed by law, files this his motion for rehearing and says:

1.

The Court in Paragraph 2 of its ruling opinion of the First Special Ground overlooked or misread the testimony of the Assistant Director of the State Crime Laboratory regarding the bullet recovered from the body of the deceased. On page 73 of the record, the Assistant Director's testimony appears as follows: "I just don't feel in my own mind that there are enough markings left on the bullet that I recovered from the body, to absolutely and positively identify it as being fired from this particular old U. S. 32, caliber revolver." Nor does the record disclose positively testimony of "several witnesses".

[fol. 90]

2

That the Court in Paragraph 3- (c) failed to give a reasonable interpretation of the failure of the lower court to exclude the jury from the court-room during the colloquy, and further failed to instruct said jury to disregard said colloquy, which took place in the presence of the jury.

3

Because the court in its opinion Paragraph 5- (b) and in its ruling that the record contained none of the evidence adduced upon the hearing of the motion of January 25, 1959, in the Court Below, overlooked the opinion in the case of Northwest Atlanta Bank v. Zee, 196 Ga. 114-118, in which Justice Duckworth interprets the Code Section as follows: "If, however, it appears to the appellate court, from the argument of the counsel on the hearing, or in the consideration of the same preparatory to making up the

judgment of the court, that any part or portion of the record of the case in the court below has not been brought up, and such part of the record is necessary, in the opinion of the court, to be before them in order to fully and fairly adjudicate the questions at issue and the alleged errors, then the court shall, by its order directed to the clerk of the court below, require him to certify and send up such portions of the record as, in the opinion of the appellate court, are needful or necessary in order to fully and fairly adjudicate the errors assigned." Thus it is obvious that notwithstanding the failure of the defendant in error to adopt the procedure in the trial court for procuring additional record, this court is required, under subsection 4 quoted above, to order certified and sent up copies of such record as appear to be necessary in order to "fully and fairly adjudicate the questions at issue and alleged errors."

BRIEF IN SUPPORT OF MOTION FOR REHEARING

We contend that every doubt should be resolved in favor [fol. 91] of the accused. Certainly, in ground one of the special grounds it appears that the expert Assistant of the State Crime Laboratory was unwilling to testify positively and identify the bullet as coming from the revolver in evidence. Thus there is no direct testimony connecting the bullet with the pistol. All of the testimony merely "hinted" or "supposed" but none of said testimony was positive.

2

In presenting our argument that the colloquy between the court and counsel for defendant in the court below was harmful and prejudicial, we insist that any reasonable and fair interpretation of the case should be in support of our position. On the important discussion of the accused's rights under the Constitution of the United States and the Constitution of the State of Georgia, we think that said action belittled and low rated the important and sacred rights of the accused.

3

In argument and support of our ground that the court should have ordered up the missing quotation of the record containing the affidavits of bias and prejudice, par-

ticularly those having to do with the relationship of the jurors. We respectfully submit that under the 196 Ga., supra, this court held that it was the duty of the court to act under its powers provided in Code Section 6-810 No. 4. We think that in the present case where the life of the defendant is in jeopardy, this ruling certainly should be more applicable in its application than that in a civil case involving only property rights. Should the court see fit now to direct that part of the affidavits and depositions which were left out of the record be sent up we think that same would support positively our contentions of error therein.

With all due respect to the Court, we submit that our motion for rehearing should be granted and the Court below reversed and a new trial granted.

Respectfully submitted, (Signed) Paul James Maxwell, Attorney for Defendant in Error.

[fol. 92] I hereby ceritfy that I am of counsel for defendant in error in the foregoing case; that I have carefully examined the opinion of the Court reversing the trial court, and I believe that the Facts, statutes and decisions referred to in the foregoing motion for rehearing have been overlooked by the Court, and that the controlling issues of law referred to therein *has* been misconstrued and misapplied.

I further certify that this motion for rehearing is not filed for purposes of delay.

(Signed) Paul James Maxwell, Of Counsel.

I certify that I have served a copy of the foregoing motion for rehearing and brief in support thereof upon Hon. Eugene Cook, Attorney General, and Hon. Dan Winn, Sol. Gen., Douglas County, by mailing a copy thereof to them, properly stamped and addressed, this 18th day of May, 1959.

(Signed) Paul James Maxwell, Of Counsel.

20446 Ferguson v. The State. Motion for a Rehearing. Filed in office May 18, 1959.

(Signed) Henry H. Cobb, D. C. S. C. Ga.

[fol. 93] IN SUPREME COURT OF GEORGIA

20446

BILLY FERGUSON

v.

THE STATE

ORDER DENYING MOTION FOR REHEARING—June 5, 1959

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 94] IN THE SUPREME COURT OF THE STATE OF GEORGIA

No. 20446

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 29, 1959

1. Notice is hereby given that Billie Ferguson, the appellant above mentioned, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Georgia (affirming the judgment of conviction), entered herein on June 5, 1959.

This appeal is taken pursuant to 28 U. S. C. A. 1257 (1).

Appellant was convicted of the crime of murder, in violation of Georgia Code Section 26-1002; was sentenced to death by electrocution and is presently confined at Douglas County jail in Douglasville, Georgia.

2. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Motion for a new trial, order to show case, and supersedeas

Amendment to original motion for new trial

Affidavits attached to amendment

Entries and order on amendment to motion

Order overruling motion as amended

[fol. 95] Bill of Exceptions

Indictment No. 4264

Entries on indictment

Brief of evidence

Order approving brief of evidence and entry

Sentence of the court

The Supreme Court of Georgia's judgment affirming the lower court

Motion for rehearing

The Supreme Court of Georgia's order dated May 19, 1959, directing the lower court to send up missing parts of record and response to such an order of the lower court dated 22nd of May 1959

Copy of decision of the Supreme Court of Georgia denying motion for rehearing

3. The following questions are presented by this appeal:

(a) That the defendant was denied due process of law in that he was deprived of a fair and impartial trial prior to, during, and after his trial, and that he was denied his constitutional rights under the XIV Amendment of the United States Constitution, by the Court interpreting Georgia Code Section 38-415 to mean that the prosecutor can cross-examine the defendant if he consents; but denying the defendant the right to have his own counsel ask him any questions or make any suggestions whatever. Thereby, denying defendant the benefit of counsel.

(b) That the confession used against the defendant in his trial, was made during an illegal detention, contrary [fol. 96] to Georgia Code Section 27-212.

(c) That the defendant was deprived of a fair and impartial trial and due process of law in that, unknown to him or his attorney, relatives of the prosecuting attorney were members of the jury.

(d) That the defendant was denied a fair and impartial trial and due process of law, in that, unknown to the defendant or his counsel, at the time of the selection of the jury, some of the jurors were biased and prejudiced against the defendant.

(e) That the defendant was denied due process of law in that the trial judge failed to certify and include in the record the testimony and affidavits adduced at the hearing of the motion for a new trial, held January 25, 1959; but which testimony and affidavits were referred to in his order overruling the motion for a new trial.

(f) That the defendant was denied due process of law in that the Supreme Court of Georgia did not compel the trial court to send up the evidence adduced upon the hearing of the motion for a new trial in support of defendant's grounds four and five thereof, and which was necessary in order to fully and fairly adjudicate the questions in issue, in compliance with Georgia Code Section 6-810, (4), although the said missing parts of the record were referred to in the order of the trial judge denying the motion for a new trial.

/s/ Paul James Maxwell, Attorney for Billie Ferguson, Appellant. 506 Atlanta Federal Savings Bldg., Atlanta 3, Georgia.

[fols. 97-98] ACKNOWLEDGMENT OF SERVICE

(omitted in printing)

[fol. 99] [File endorsement omitted]

[fol. 100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 434 Misc.

BILLY FERGUSON, Appellant,

vs.

GEORGIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—February 29, 1960

On Consideration of the motion for leave to proceed further herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby granted.

[fol. 102] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 434 Misc.

BILLY FERGUSON, Appellant,

vs.

GEORGIA

Appeal from the Supreme Court of the State of Georgia

ORDER NOTING PROBABLE JURISDICTION—February 29, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 743.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 846026 1231

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 44

BILLY FERGUSON,

Appellant,

vs.

THE STATE OF GEORGIA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF ON THE MERITS

PAUL JAMES MAXWELL
Counsel for Appellant
506 Atlanta Fed. Sav. Bldg.
Atlanta 3, Georgia

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SUBJECT INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 44

BILLY FERGUSON,

Appellant,

vs.

THE STATE OF GEORGIA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF ON THE MERITS

Opinion Below

The opinion of the Supreme Court of Georgia (R. 73) is reported in 215 Ga. 117.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on May 8, 1959 (R. 78). A timely petition for rehearing filed on May 18, 1959 (R. 81), was denied on June 5, 1959 (R. 82). The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (2) (since the validity of a State Statute on grounds of repugnancy to the Constitution of the United States is drawn in question).

Questions Presented

Whether the appellant received a fair and impartial trial, and whether his constitutional rights were violated before, during, and after his trial under these facts:

1. The defendant, a nineteen year old boy was arrested without a warrant on July 17, 1958, he was lodged in jail and questioned by at least five or six police officers. He was held in custody without being taken before any committing magistrate from July 17, 1958, until September 15, 1958, in violation of Georgia Code Section 27-212 (Acts of 1956). During which time the defendant, a young boy of low mentality, was coerced into making a confession. And while the accused was advised that he did not have to make a confession, he was not advised of his constitutional right to have counsel.

2. At his trial, unknown to the defendant or his counsel, there were two jurymen related to the State Prosecutor. And, a third juryman was related to the Sheriff that had custody of the defendant.

3. During the trial the defendant took the witness stand in his defense but he was denied his constitutional right of having the "guiding hand of counsel at every step in the proceeding against him."

4. Upon appeal of defendant's conviction to the Supreme Court of the State of Georgia, it was discovered by the defendant's attorney that the trial court clerk failed to include in the record sent up to the Supreme Court of Georgia, important parts of such record in support of defendant's contention that he was not given a fair and impartial trial. Under Georgia Law, Code Section 6-810 (4), the Supreme Court of Georgia is required to have sent

up any additional parts of the record that have been omitted.

A reading of the record will show that the Supreme Court of Georgia, and the Clerk of the lower court dilly-dallied around about the record, but it was never sent up for the Supreme Court of Georgia to fully and fairly adjudicate the questions at issue. Thereby denying the defendant equal protection of the law by denying him the same right that the Supreme Court gave to others in 196 Georgia 114, and cases therein cited.

Statutes Involved

Section 27-212, Georgia Criminal Code, Acts 1956, pp. 796-797.

> "In every case of an arrest without a warrant the person arresting shall without delay convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose and any person who is not conveyed before such officer within 48 hours shall be released."

Section 38-415, Georgia Code on Evidence.

> "In all criminal trials, the prisoner shall have the right to make to the court and jury such statements in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer."

Section 6-810, Georgia Code on Pleading and Practice. —(4)

"If, however, it appears to the appellate court, from the argument of the counsel on the hearing, or in the consideration of the same preparatory to making up the judgment of the Court, that any part or portion of the record of the case in the court below has not been brought up, and such part of the record is necessary, in the opinion of the Court, to be before them in order to fully and fairly adjudicate the questions at issue and the alleged errors, then the Court shall, by its order directed to the clerk of the court below, require him to certify and send up such portions of the record as, in the opinion of the appellate court, are needful or necessary in order to fully and fairly adjudicate the errors assigned."

Statement

On September 24, 1958, the appellant was found guilty on a bill of indictment charging him with the offense of murder (R. 4), in violation of Georgia Criminal Code Section 26-1002. He was sentenced to death by electrocution (R. 70). A motion for a new trial was filed October 10, 1958 (R. 6, 7, 8, 9, 10, 11, 12, 13, 14). The trial court denied the motion for a new trial February 3, 1959 (R. 15-16). The case was appealed to the Supreme Court of Georgia, which court affirmed the lower court on May 8, 1959 (R. 78). A motion for rehearing was filed May 18, 1959 (R. 79-81). The motion for rehearing was denied by the Supreme Court of Georgia June 5, 1959 (R. 82). Notice of appeal to the Supreme Court of the United States was filed August 29, 1959 (R. 82). The order of the Supreme Court of the United States noting probable jurisdiction was entered February 29, 1960 (R. 85).

Summary of Argument

I. We contend this appellant was denied a fair and impartial trial and his constitutional rights were violated before, during, and after his trial.

For the Supreme Court of Georgia to interpret and construe Section 38-415 of the Code of Georgia to mean that a defendant in a criminal case can be cross-examined, if he consents, by the prosecutor, but has no right to have his own counsel ask him any questions or assist him in any way while the defendant is making his statement to the jury, unless the trial judge in his discretion permits it, is in direct violation of both the due process clause and the equal protection clause of the Constitution.

II. The appellant, while being illegally detained in violation of Georgia Code Section 27-212, was mentally coerced into making a confession by a group of police officers, who questioned him continuously for approximately seven hours. During this time, he was forced to take a paraffin test. He was never told of his constitutional right to have counsel.

III. Unknown to appellant and his counsel, until after the trial, relatives of the prosecuting attorney and the sheriff were members of the trial jury. Also unknown to appellant or his attorney, some jurors were biased and prejudiced against the appellant and thereby deprived him of a fair and impartial trial.

IV. Appellant was denied equal protection of the law by the Supreme Court of Georgia by refusing to compel the trial court to send up missing parts of the record in violation of Georgia Code Section 6-810 (4), in order to fully and fairly adjudicate the questions in issue.

Argument

I.

In our American Jurisprudence, a citizen accused of crime has a basic fundamental right to have the benefit of counsel during all stages of the prosecution and trial. A state statute, a decision of a court, or a practice or custom which denies such a right and privilege is forbidden under our Federal Constitution. Likewise, such an interpretation of a statute is repugnant to said constitutional provisions.

It is submitted therefore, that the interpretation of Code Section 38-415, by the Supreme Court of Georgia, *supra*, to mean that the defendant cannot be asked any questions by his attorney (R. 8) is unconstitutional.

Code Section 38-415 or its predecessors appear to have been the law in Georgia since 1868, at which time it applied only to felony cases, but it was later extended to all criminal cases. The constitutional validity of this Code Section was never attacked until the case of *Corbin* v. *The State*, 212 Ga. 231 (7a), wherein the Supreme Court of Georgia held: "During the trial the defendant made no sufficient attack on the constitutionality of our statute, or any part thereof which gives the defendant the right to make a statement to the court and jury in his behalf." Therefore, a certiorari was denied by this court in 351 U.S. 987.

The most important period in the trial of any criminal case is when defendant is on the stand. It can take or save his life in capital cases, and in others, it can take or save his liberty or property. If he is guaranteed "the right to have the assistance of counsel in his defense" by the Constitution and is guaranteed by the State Constitution the benefit of counsel, by what reason is he denied assistance and benefit of counsel at the most crucial point of his

trial? Such construction and application of section is absurd and violates both State and Federal Constitutions. Under such construction, when a defendant goes on the stand to make his statement, all assistance and benefit of counsel disappears from the case till he comes off the stand as completely as if his attorney was out of town.

It is submitted the Georgia Courts are wrong in the above construction and application of this Code Section (38-415) which says: "*The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.*" This Code Section does not say *direct examination,* therefore, it does not prohibit defendant's answering any questions asked him by his own attorney. Where and by what right do the Georgia Courts get the notion and decide that the defendant's counsel cannot ask defendant any questions (R. 8)? Such is not the law and such construction is prohibited by the law itself. Such an interpretation flies in the face of common sense—when section is correctly construed.

The paramount consideration in statutory construction is the effectuation of the intent of the legislature. Is it not logical that had the legislature intended that the defendant could not be asked questions by his own attorney that they would have used the words "direct examination"? Is it not also logical that the only reference in this Code Section as to being asked questions distinctly and only refers to "cross-examination"? This is only natural as the legislature did not by any means ever intend to deprive the defendant of his State and Federal Constitutional right of benefit of counsel.

Let us now proceed a step further regarding this Code Section. The Supreme Court of Georgia (R. 75b) says: "It has been repeatedly held by this Court that counsel for the accused cannot, as a matter of right, ask the accused

questions or make suggestions to him when he is making his statement to the court and jury." However, in *Corbin* v. *State*, 212 Ga. 231 (7), it was held that while the defendant's counsel has no right to ask him any questions, "the trial judge, in his discretion, can permit his counsel to ask him questions. In *Echols* v. *The State*, 109 Ga. 508, 512, it was said " . . . his counsel has no right to ask him questions. Doubtless the court might, at the prisoner's request, permit questions to be put to him, as a matter of discretion. Doubtless this discretion will, on all proper occasions, be exercised favorably to the accused." We submit to interpret this Code Section to mean it is discretionary with the trial judge as to whether or not the accused shall have the benefit and assistance of counsel would be discriminatory and would therefore deny to some defendants the equal protection of the law that would be given to others.

In *Missouri* v. *Lewis*, 101 U.S. 22-25, it was said: "Equal protection of the laws means no person shall be denied the same protection of the laws which is enjoyed by other persons in the same place and under like circumstances." In *Griffin* v. *People, State of Ill.*, 351 U.S. 12, it was said: "Constitutional guarantees of this clause and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons . . . Both equal protection and this clause emphasize the central aim of judicial system that all people charged with crime must stand on an equality before the bar of justice."

In *Harrison* v. *The State of Georgia*, 83 Ga. 129, on page 136 it was said regarding this Code Section (38-415) "There is no obscurity or ambiguity in the statute. The legislature has made the matter as clear as can the judiciary. Why should not the legislature be left to address the jury in its own language?" Why should the presiding

judge have the discretion to go beyond its terms? Though Code Section 38-415 appears to be fair on its face and impartial in appearance, yet if it is applied and administrated as the Georgia courts have been and are doing by making unjust and illegal discriminations between persons in similar circumstances, thereby denying equal justice, we submit would be violative of the equal protection clause of the Fourteenth Amendment.

For the Supreme Court of Georgia to deny defendant the benefit of counsel at any stage of his trial, or to hold that it is discretionary with the trial judge, is tantamount to a denial of due process of law. *Auto-Rite Supply Co.* v. *Mayor*, 124 A2d 612.

In *Powell* v. *State of Alabama*, 287 U.S. 45, Mr. Justice Sutherland said, " . . . he (defendant) requires the guiding hand of counsel at *every stage in the proceeding against him* . . . " (Emphasis supplied.)

It is submitted that this Code Section properly construed means the defendant can make such statement as he wishes. He shall not be sworn. He may be asked questions like a witness, but he cannot be compelled to answer any questions on cross-examination if he declines to do so. This would give him assistance and benefit of counsel while on the stand when it is needed most to counteract stage fright and paralysis of speech. It is our contention that Georgia Code Section 38-415 as construed by the Georgia Supreme Court is invalid.

II.

This appellant was arrested without a warrant and was not taken before a committing magistrate in violation of Georgia law, Code Section 27-212 (Acts 1956), he was held in jail from the day of his arrest July 17, 1958 (R. 11), until the day of his trial September 23, 1958. During all

that time he was never taken before a committing magistrate for a preliminary hearing to be informed of his rights as to what he was charged with, and that he had a right to counsel. Appellant's counsel, on September 4, 1958, filed a Writ of Habeas Corpus setting forth these facts; however, the trial judge did not set it down for a hearing until 2:30 p.m. on September 15, 1958, a few minutes before the scheduled hearing on the Writ, the Grand Jury indicted the appellant on a charge of murder. The trial judge then issued a bench warrant for his arrest, although he had been and still was incarcerated for about two months. The judge then dismissed the Writ stating "it is now moot because I just issued a warrant."

Code Section 27-212, *supra*, states: ". . . the person arresting shall without delay convey the offender before a committing officer . . . No such imprisonment shall be legal beyond a reasonable time for this purpose and any person who is not conveyed before such officer within 48 hours shall be released."

It is contended therefore, that to arrest and hold this appellant in jail for nearly two months in direct violation of the Georgia law made this an illegal arrest and detention. While thus being illegally held, this appellant, a nineteen year old boy of low mentality, was questioned for about seven hours and was forced to take a paraffin test by a group of policemen, deputy sheriffs, and Georgia Bureau of Investigation officers, all of whom refused to take this boy before a committing magistrate, under Georgia law, in order to inform him of his right of having counsel, etc. And, after this prolonged questioning a confession was obtained (R. 9, 10, 11). It will be noted that the said confession states: "I have been advised of my rights that I do not have to make a statement . . . " (R. 9). However, it does not say he was advised of his right to have counsel. In *Sullivan* v. *D. C. Utah*, 126 F. Supp. 564, it was stated:

"Due process clause of this amendment protects criminal defendants in State Courts in their right to assistance of counsel, and this right contemplates not only right to counsel in trial, but also at every stage of the proceedings, at least in capital cases where death sentence has been imposed."

This court held in *Payne* v. *State*, 353 U.S. 929: "The use in a state criminal trial of a defendant's confession obtained by coercion, whether physical or mental, is forbidden by this clause" (Due process of law). See also *Tarrence* v. *Buchanan*, 126 F. Supp. 752; *Alvarez* v. *Murphy*, 246 F.2d 871; *Turner* v. *Penn.*, 338 U.S. 62; *Watts* v. *Indiana*, 338 U.S. 49; *Ashcraft* v. *Tenn.*, 322 U.S. 143; *Chambers* v. *Florida*, 309 U.S. 227.

III.

The trial judge in his order overruling the motion for a new trial (R. 15) says, "the court finds as a matter of fact, from affidavits of the twelve jurors sworn to try said case, submitted in behalf of the State of Georgia that the question, 'are you related to the solicitor, or to anyone in his office or anyone around the table' was not in fact and in truth asked of the said jurors *individually* or collectively while said jurors were being examined . . ."

This can mean only one thing, that the Honorable trial judge did not read all of the twelve affidavits because each and every juror swore in his affidavit that he was asked by counsel for defendant, how well he knew the solicitor and the sheriff. The affidavit of one juror states that he was asked by counsel for the defense if he was related by blood or marriage to anyone at the prosecution table. Another juror swore that he did not remember for sure.

Douglasville, Georgia, where this trial was held, is a small town of about three thousand population, and defense

counsel realizing it would be difficult to find an unbiased jury, asked each prospective juryman if he was related to the State prosecutor and also asked them how well they knew him.

We submit that even if the only question asked them was how well they knew the solicitor, all twelve jurors admitted in their affidavits that it was asked of them, then is it not logical to assume that the relatives of the State prosecutor should have said that they were in fact related to him?

The Georgia Supreme Court in their decision (R. 76a) says in effect that in a *criminal case* it is all right if the jurors are related to the solicitor who prosecutes the case because he is acting in an official capacity of the court, and is not such a party interested in the result of the case.

It certainly cannot be said that a jury composed of relatives of the prosecuting attorney, who is doing everything in his power to convict, would be unbiased, nor can such a juror be considered an impartial juror in the sense of that term as used in the constitutional provision which guarantees an impartial trial.

The affidavits of the defendant (R. 14) and his counsel (R. 12-13) show that the relationship was unknown to them until after the trial. The solicitor who prosecuted this case has stipulated that two members of the jury were in fact related to him, and one other was related to the sheriff of the county.

The record also shows (R. 12-13) that there was evidence of prejudice on the part of the jury, but the trial judge did nothing about it. As was said by this Court in *Murchison*, 349 U.S. 133, "A fair trial in a fair tribunal is a basic requirement of due process, and requires an absence of actual bias in trial of cases." See also *Massey* v. *Moore*, 348 U.S. 105.

IV.

When this case was appealed to the Supreme Court of Georgia, affidavits and depositions were left out of the record sent up by the lower court. These missing parts of the record had to do with the relationship of jurors to the solicitor, as well as bias and prejudice. It is well to note that the trial judge in his order overruling the motion for a new trial (R. 15-16), refers to no other grounds of the amended motion for a new trial (R. 7, 8, 9, 10, 11, 12, 13, 14, 15) except grounds four and five to which the missing parts referred. It is also to be noted in the order of the judge overruling the motion for a new trial (R. 15), that he states, "further evidence (affidavits) and argument has been duly and timely presented . . . "

The Supreme Court of Georgia in their opinion (R. 76b) held that because the missing parts had not been sent up in reference to grounds four and five, they had no way of determining whether or not the trial judge abused his discretion in overruling these grounds for a new trial.

The appellant in his motion for rehearing (R. 79, 80, 81) (3), requested the Supreme Court of Georgia to order the missing affidavits sent up under the authority given by Georgia Code Section 6-810 (4) and this Code Section was held in *Northwest Atlanta Bank* v. *Zec*, 196 Ga. 114-118, by Chief Justice Duckworth to mean " . . . this court is *required*, under subsection 4, to order certified and send up copies of such record as appear to be necessary in order to *fully and fairly adjudicate* the questions at issue and alleged errors." (Emphasis supplied.)

In response to this request, the Supreme Court of Georgia instead of ordering the missing *affidavits and depositions*, directed the trial court to send up "a properly certified copy of the *approved brief of evidence* . . . if the same be of

file. If it be not of file, let the said clerk certify to that fact" (R. 72). (Emphasis supplied.)

The clerk of the lower court did what he was ordered (R. 72), and informed the Supreme Court that he had the missing parts on file, but no *approved brief of evidence*.

We would like for this court to notice that the Supreme Court of Georgia *did not* order up what was requested of them, instead they asked for an approved brief of evidence and then in their order denying the motion for a rehearing (R. 77-78) stated (R. 78): " . . . or that it, the depositions, or counter-showing by the State have been *approved by the judge so as to become a part of the record which could be transmitted by the clerk to this court and they cannot now, since certification of the bill of exceptions, be made a part of the record.*" (Emphasis supplied.)

In a recent decision of the Supreme Court of Georgia, *McCrary* v. *The State*, 215 Ga. 887, and in which case this counsel was also attorney of record, the Supreme Court of Georgia, without request of counsel, issued the following order to the trial court: "It is ordered that the clerk of the Superior Court of Fulton County transmit to this Court, without delay, a properly certified copy of the state's traverse to motion to withdraw the plea of guilty." It was sent up and considered as part of the record. And, when counsel in his motion for a rehearing in the *McCrary* v. *The State* case, *supra*, informed the Supreme Court of Georgia, that neither McCrary nor his counsel had ever been served with a copy of the traverse, and that the defendant did not specify such traverse in his bill of exceptions that had been certified and approved by the trial judge, the court in its decision stated: "This court, in an *abundance of precaution to assure the full protection of the legal rights of the movant*, desired to know whether the solicitor had made any admission favorable to the movant, and ordered

the clerk of the trial court to transmit the state's traverse to this court, under the ample authority to order such a record given by Code 6-810 (4)." (Emphasis supplied.)

We submit therefore, that the Supreme Court of Georgia, the highest court of the state, denied to the appellant in the instant case the right to have the missing affidavits sent up on the ground that they could not now, since certification of the bill of exceptions, be made a part of the record. However, this right was granted the state in the case of *McCrary* v. *The State, supra.*

We contend that the Supreme Court of Georgia did not give this appellant an abundance of precaution to assure the full protection of the legal rights due him, by not ordering up the missing parts requested of them (R. 80-81) (par. 3), as was given the defendant in the case of *McCrary* v. *The State.* A reading of the trial judge's order denying the motion for a new trial (R. 15) clearly shows that the said missing parts of the record had been "duly and timely presented" to him before January 1959, and the bill of exceptions that was approved by the trial judge (R. 3) on February 25, 1959, clearly states in Paragraphs two and three (R. 2) "and all entries and orders thereon." It was therefore unnecessary for the Supreme Court of Georgia to add the word "approved" to its order (R. 72).

We contend, in all due respect to the Supreme Court of Georgia, that because they did not have the missing affidavits sent up, either by mistake or by oversight, or for any other reason whatever, they did nevertheless deny this appellant the absolute legal right that he has, under Georgia law, Code Section 6-810 (4) to have *any* missing parts sent up from the trial court so that the Supreme Court of Georgia would have the missing parts before them in order to fully and fairly adjudicate the questions at issue.

We also contend that the Supreme Court of Georgia denied this appellant the equal protection of the law that was given to others in *Northwest Atlanta Bank* v. *Zec*, 196 Ga. 114-118, and cases therein cited. Also *McCrary* v. *State*, 215 Ga. 887.

Conclusion

For the reasons above stated, this appellant has been denied his constitutional rights of a fair, impartial, and legal trial before, during, and after his trial.

It is the duty of our courts to see that every person tried for a crime be given a completely fair and impartial trial and to see that none of his constitutional rights are violated or denied. To do otherwise would reduce the judicial process to sham, and the fundamental aspects of fairness result in a miscarriage of justice.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

PAUL JAMES MAXWELL
Counsel for Appellant
506 Atlanta Fed. Sav. Bldg.
Atlanta 3, Georgia

PETITION NOT PRINTED IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1960

NO. 44

BILLY FERGUSON
Appellant
v.
THE STATE OF GEORGIA
Appellee

Appeal from the
Supreme Court of Georgia

BRIEF OF THE APPELLEE

EUGENE COOK
Attorney General of Georgia
Attorney for Appellee

Of Counsel:
JOHN T. FERGUSON
DAN WINN
JOHN T. PERRIN
ROBERT J. NOLAND

CITATIONS

Cases:

Constitutional and Statutory Provisions:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 44

BILLY FERGUSON
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BRIEF OF THE APPELLEE

OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 73-78) affirming the conviction of appellant for murder is reported as **Ferguson v State** 215 Ga. 117, 109 S.E. 2d 44, decided May 8, 1959, rehearing denied June 5, 1959.

QUESTIONS PRESENTED

1. Upon an appeal to the United States Supreme Court from the decision of a State court under the provisions of Section 1257(2), United States Code, in which the validity of a State statute has been sustained by the State Su-

preme Court against an attack alleging that it is repugnant to the Constitution of the United States, will this Court restrict its review to the constitutional validity of the State statute involved, or will it review the case in its entirety, even though no additional federal issues were raised before and passed upon by the State courts?

2. Does Section 38-415 of the Code of Georgia, as interpreted by the State court authorizing the defendant in a criminal case to make an unsworn statement but not permitting him to submit himself to direct examination except in the discretion of the trial court, violate the due process clause of the 14th Amendment to the Federal Constitution by depriving the defendant of his right to counsel?

3. Assuming, but not conceding, that this Court will review all issues in this case, even though not presented to and passed upon by a State court as federal issues, the following additional questions would be presented:

a. Does the admission into evidence by a State court of a confession freely and voluntarily given by a criminal defendant under no coercion or threat or promise of reward, when the accused has been fully advised of his rights, including the right to counsel, violate any Federal constitutional rights of the accused, even though at the time that the confession was made, the accused was being held without having had a preliminary hearing, when the confession was made less than eight hour after the arrest?

b. Was there any denial of Federal due process in the Supreme Court of Georgia adhering to its established procedure and refusing to pass upon alleged errors involving questions of evidence when there was no certified brief of evidence?

STATUTES INVOLVED

Section 38-415, Georgia Code.

> In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

Section 38-416, Georgia Code.

> No person, who shall be charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction, shall be competent or compellable to g i v e evidence for or against himself.

STATEMENT

In this case, the defendant, Billy Ferguson, was indicted in Douglas County on September 15, 1958, for the murder of Luke A. Brown on July 17, 1958 (R. 4). He plead not guilty, (R. 5) and was tried September 23 through September 24, 1958, and found guilty (R. 5, 6). He was sentenced to death by electrocution (R. 70). The

defendant's motion for new trial (R. 6) as amended (R. 7), was overruled on February 3, 1959 (R. 15 and 16). The Supreme Court of Georgia affirmed the conviction on May 8, 1959 (R. 73-77) and denied a motion for rehearing June 5, 1959 (R. 82). The defendant filed his Notice of Appeal to the Supreme Court of the United States on August 29, 1959 (R. 82-84). This Court noted probable jurisdiction and transferred the case to the appellate docket on February 29, 1960 (R. 85)

The evidence introduced at the trial of the case showed that Luke A. Brown was killed near the city of Douglasville, Georgia, on July 17, 1958, around 7 A.M. (R. 17). The defendant had been seen in the vicinity around the time of the crime (R. 17), and was stopped by two police officers on a highway leading to Douglasville around 10 A.M. and was taken to the county jail (R.25). He talked to some officers but made no confession (R. 25, 35, 41). He was not confined in a cell but was placed in the run-around on the ground floor of the jail (R. 28). The defendant was permitted to call his fiancee from the jail around Noon (R. 56). About 4 P.M., the defendant, having been fully advised of his right to remain silent and his right to counsel, freely and voluntarily confessed that he had committed the murder of Mr. Brown (R. 25, 37, 38, 62, 63). The defendant stated that he had murdered Mr. Brown because "If I had let him live he could have told who I was" (R. 37). The defendant's confession was then reduced to writing, and signed by him, and introduced into evidence (R. 68-69). After this occurred, the same afternoon, the defendant in

talking to his fiancee admitted that he had killed Mr. Brown (R. 56, 58, 59, 60).

SUMMARY OF ARGUMENT

The sole question presented by this appeal is the validity of Georgia Code Section 38-415 under the 14th Amendment to the Federal Constitution as being a denial of the right to counsel. This section authorizing the defendant in a criminal proceeding to make an unsworn statement but not permitting direct examination except in the discretion of the trial court, when construed with other provisions of Georgia law providing that the defendant in a criminal case is an incompetent witness, simply extend to the defendant a privilege unknown to common law and it is not a denial of the right to counsel to require counsel to conform to reasonable procedural requirements in the exercise of this privilege.

Although the constitutionality of Code Section 38-415 was the only issue presented to the State courts as involving a Federal question, in the event that this Court desires to review the other issues sought to be raised, it is respectfully submitted that the record clearly shows that the confession given by the defendant was freely and voluntarily given, and hence clearly admissible into evidence in a State court, if not a Federal court. The other alleged errors simply involve dissatisfaction with State procedural requirements, and present no aspects of the denial of a Federal right.

ARGUMENT

1. Upon an appeal to the United States Supreme Court from the Highest Court of a State under the provision of Section 1257 (2), Title 28, USC, the only question presented is the Constitutionality of the State Statute held valid by the State Court, when there have been no other Federal Questions raised before the State Courts.

This case is an appeal from the Supreme Court of Georgia, under the provisions of Section 1257 (2) of Title 28, U.S.C. The defendant in the trial court (R. 8,9) and before the appellate tribunal. contended that Section 38-415 of the Code of Georgia, was a violation of the Fourteenth Amendment to the Constitution of the United States in that it denied him due process by depriving him of his right to counsel. The Supreme Court of Georgia ruled adversely to the defendant's contentions, and upheld the constitutionality of the State statute involved (R.75). This Court was thus given jurisdiction by way of appeal, and it is respectfully submitted that the sole question presented to this Court is whether Section 38-415 violates the due processs clause of the Fourteenth Amendment to the Federal Constitution since none of the other issues sought to be raised by the appellant in his jurisdiction statement and brief filed in this Court, were presented to the State courts of Georgia as involving Federal questions or the denial of Federal rights.

In order to determine whether there were any Federal questions properly presented to

the State Courts, it is necessary to closely examine the record of this case. Defendant's amendment to his motion for a new trial (R.7-12) contains five special grounds.

Ground One (R.7) is not in any way involved in this appeal. Ground Two (R. 7) concerns the constitutionality of Georgia Code Section 38-415, which appellee contends is the only issue before this Court. Ground Three (R. 9-11) alleged error in the admission into evidence of a confession made by the defendant, on the grounds that the defendant was being held illegally and therefore making the confession "void". There is no allegation that the admission of this confession into evidence violated the defendant's rights under the Federal Constitution. Grounds Four and Five (R. 11-12) allege error on the grounds that members of the jury were related to the Solicitor General and also that certain jury members were biased and prejudiced. Here again the defendant failed to base the alleged error upon the grounds of deprivation of Federal constitutional rights. An examination of the defendant's bill of exceptions (R. 1-3), his motion for rehearing (R. 79-81), and the opinion of the Supreme Court of Georgia (R. 73-78), show that the only mention of Federal constitutional rights is in connection with the discussion of the validity of Georgia Code Section 38-415 (R.75).

Even in his Notice of Appeal to this Court (R. 82-84), defendant refers to only one ground as denying a Federal constitutional right, (R. 83) the other questions which are presented according to the Notice of Appeal are alleged to

be violations of "due process", but it should be noted that Article I, Section I, Paragraph III of the Constitution of Georgia (Ga. Code Anno. Section 2-103) contains a due process clause, as explicit as the mandate of the Fourteenth Amendment to the United States Constitution.

The first time that the defendant mentions anything denying Federal constitutional rights other than the alleged unconstitutionality of Georgia Code Section 38-415, is in his jurisdictional statement filed in this Court, where he, under the heading of "Questions Presented" attempted to present as one question involving Federal constitutional issues, the whole of the trial and appellate court proceedings in his case.

It is respectfully submitted that under these circumstances, the only question presented for determination by this Court, is the validity of Georgia Code Section 38-415 under the Fourteenth Amendment to the United States Constitution. "It is not enough that there be somewhere hidden in the record, a question which, if raised, could be of a Federal nature. (Citation omitted.) In order to be available in this Court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States." **Dewey v. Des Moines,** 173 U.S. 193, 199-200, 43 L. Ed. 665, 667 (1899). It is necessary in order to obtain from United States Supreme Court an adjudication as to the denial of a right under the Federal Constitution, that a claim of such

denial be presented to the lower Court. "A claim which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. (Citation omitted). A point that was never raised cannot be said to have been decided adversely to one who never set it up or in any way alluded to it . . . " **Dewey v. Des Moines,** 173 U.S. 193, 199-200, 43 L. Ed. 665, 667 (1899); see also **Cent. Vt. Ry. Co. v. White Admx.,** 238 U.S. 507, 59 L.Ed. 1433 (1915) **Bothwell v. Buckbee, Mears Co..,** 275 U.S. 274, 72 L.Ed 277 (1927); **Northwestern Bell Tel. Co. v. Neb. State Railway Comm.,** 297 U.S. 471, 80 L.Ed 810 (1936). See also **Manhatten Life Insurance Company v. Cohen,** 234 U.S. 123, 58 L. Ed. 1245 (1945); **Whitney v. California,** 274 U. S. 357, 362, 71 L. Ed. 1095, 1100 (1926).

II. Section 38-415 of the Code of Georgia, as interpreted by the Courts of Georgia, authorizing the defendant in a criminal case, who is incompetent as a witness, to make an unsworn statement, but permitting direct examination only in the discretion of the Trial Court does not violate the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, and even if Section 38-415 is invalid, the defendant in this case would not be benefited since he would be unable to make any statement.

Section 38-415 of the Code of Georgia reads as follows:

> In all criminal trials, the prisoner shall have the right to make to the court and jury such

statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

The Courts of Georgia have interpreted this Code Section to mean that "counsel for the accused cannot, **as a matter of right,** ask the accused questions or make suggestions to him when he is making his statement to the court and jury". (Emphasis supplied). (R. 75) See also **Corbin v. State,** 212 Ga. 231 (7), 91 S.E. 2d 764 (1956), Cert. den. 351 U.S. 987, 100 L. Ed. 150. This statement by the Georgia Courts is an authoritative determination as to the meaning of Code Section 38-415 and as such is binding on the United States Supreme Court as to the meaning of the statute. **Williams v. Kaiser,** 323 U.S. 471, 89 L.Ed. 391 (1944). Counsel for the defendant on page 7 of his brief attacks the interpretation given to Code Section 38-415 by the Georgia Court stating that it "flies in the face of common sense" and is illogical, and contrary to legislative intent. It is respectfully submitted that this argument is not open to the defendant in the present proceeding. As was stated by Mr. Justice Sutherland, "We are not at liberty to disregard the explicit holding of the State Court as to the basis of its decision, except for convincing reasons which here we are unable to find. We are bound by the decisions of that court as though the meaning as

fixed by the Court has been expressed in the statute itself in specific words. (Citation omitted). **Guaranty Trust Company of N.Y. v. Blodgett,** 287 U.S. 509, 77 L. Ed. 463 (1932).

Of course, the interpretation given Code Section 38-415 by the Georgia Courts is binding upon this Court only as to the meaning of the statute involved and does not foreclose review by this Court as to the validity of the law under the due process clause of the Fourteenth Amendment to the United States Constitution, but it is respecfully submitted that this latter is the only question submitted to this Court for determination by this appeal.

In order to determine the constitutionality of the involved statute, it is necessary to examine not only the State law itself as previously quoted, and its interpretation by the Georgia Courts, but also other pertinent provisions of Georgia Law. Of particular interest in this regard is Georgia Code Section 38-416 (quoted on the 3rd page of this brief) which provides that no person charged with a criminal offense shall be competent or compellable to give evidence for or against himself. This latter Code Section pre-dates Code Section 38-415 having been part of the common law of England which was adopted by the State of Georgia; see Prince's Digest, p. 570; Cobb's Digest, p. 721; **Wigmore on Evidence,** 3rd Ed. Section 579; see also **Doe ex dem Patterson v. Winn,** 5 Pet 233, 8 L. Ed. 108 (1831). This common law disqualification of criminal defendants as witnesses, first appeared in the statutory law of Georgia in 1866, when the legislature removed common law dis-

qualifications from certain witnesses, but specifically retained the disqualification of criminal defendants. (Ga. Laws, 1866, p. 138)

Two years after placing this common law disqualification of witnesses into the statute law of the State, the General Assembly extended to criminal defendants in felony cases the privilege of making an unsworn statement to the jury. (Ga. Laws, 1868, p. 24). This privilege was later extended to all criminal defendants. (Ga. Laws, 1874, p. 22; Ga. Laws 1878-79, p. 23) These three acts, unchanged except for minor modifications, made by Code revisors, constitute the present Section 38-415 of the Georgia Code, the law which defendant in this case attacks as contravening the Fourteenth Amendment to the United States Constitution. In other words, the defendant is contending that the law of Georgia extending to him a privilege to make an unsworn statement is unconstitutional because he cannot have his counsel ask him questions upon direct examination.

It is respectfully submitted that such does not in any way infringe upon the defendant's rights under the due process clause of the Fourteenth Amendment to the United States Constitution by depriving him of his right to counsel. As was stated by the Supreme Court of Georgia, the right to counsel confers "only the right to have counsel perform those duties and take such actions as are permitted by law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel." (R. 75)

Defendant cites the case of **Powell v. Alabama,** 287 U.S. 45, 77 L. Ed. 159 (1932) for the proposition that the defendant "requires the guiding hand of counsel at every stage in the proceeding against him." However, the **Powell** Case differs vastly upon its facts from the case at bar. In the **Powell** Case, the defendant was not furnished effective assistance of counsel because counsel was unable to prepare for trial. In this case, there is nothing in the record to show that counsel could not (or even did not) advise his client of Georgia procedure and the fact the client would make an unsworn rather than a sworn statement. There was nothing to prevent counsel from questioning his client prior to trial, and advising him as to what points to emphasis in such a statement. And despite counsel's statement to the contrary in his brief, there is nothing in the record to show that the defendant was not of normal intelligence and able to comprehend fully the advise of his counsel. In fact the record shows that he was an average employee of Piedmont Roofing Company (R 33-34). The Georgia Law attacked here is admittedly distinctive and differs from that of every other American jurisdiction; **Wigmore on Evidence,** 3rd Ed. Section 579, but the due process clause of the Federal Constitution does not require a uniform code of procedure in the several states in the administration of criminal law, **Bute v. Illinois,** 333 U.S. 640, 92 L. Ed. 986 (1948); **Fay v. N.Y.,** 332 U.S. 261, 91 L. Ed. 2043 (1947); **Hysler v. Florida,** 315 U.S. 411, 86 L. Ed. 932 (1941). "It is for them (the states) therefore to choose the method and practices by which crime is brought to book, so long as

they observe those ultimate dignities of man which the United States Constitution assure . ." **Carter v. Illinois,** 329 U. S. 173, 175; 91 L.Ed. 172, 175 (1946). It is respectfully submitted that the Georgia practice of allowing a criminal defendant who is incompetent to be a witness, to make an unsworn statement without being under direct examination by his counsel, is not violative of these dignities, but rather is extending to defendant a privilege which he did not have at common law. Cf. **Leland v. Oregon,** 343 U.S. 790, 96 L. Ed. 1302 (1952).

The contention made by the defendant in this case is somewhat similar to the contention made in a recent case in the Sixth Circuit, where the Court of Appeals for that Circuit summarily held that the Constitution does not require that an imprisoning authority transfer an inmate serving a lawful sentence to another prison so that he could be nearer to his counsel. **Bullock v. United States,** 265 F. 2d, 683, 695 (C. A. 6th Cir., 1959), Cert. den., 360 U.S. 909, 3 L. Ed. 2d 1260. It is submitted that this case is similar in principle with the case at bar, since in both, the defendant is asking for special privilege in the name of his "right to counsel" and in both the courts have decided that the contention was irrevelant to what actually occurred.

Defendant in his brief filed in this court attempts to raise for the first time the issue of that Code Section 38-415 is also unconstitutional under the Fourteenth Amendment to the Federal Constitution as denying the defendant equal protection of the laws because the section

has been interpretated by the Georgia Courts to mean that the trial court has discretion as to whether or not it will permit direct examination of a criminal defendant by his counsel. Cf. **Corbin v. State**, 212 Ga. 231, 91 S.E. 2d 764 Cert. den., 351 U.. 987; 100 L. Ed. 1501 (1956). Not only is it too late to raise the new unrelated issue in this Court, **Dewey v. Des Moines**, 173 U. S. 193, 43 L.Ed. 665 (1899), but also the defendant failed to ask the trial court to exercise its discretion and allow his counsel to question him or point out any omission in his statement, and hence cannot complain because it was not exercised in his favor. **Holley v. Lawrence**, 317 U.S. 518, 87 L.Ed. 434 (1943).

III. The admission into evidence of a confession freely and voluntarily given by the defendant when he had been fully advised of his rights to make or not make a statement and of his right to counsel, does not violate the Fourteenth Amendment to the Federal Constitution, even though the defendant was later held for a period of time exceeding that authorized by Georgia Law for taking the accused before a committing officer.

The issue raised by the defendant in regard to the admission into evidence of his confession is more of a factual rather than a legal one. The law in this respect, seems to be well settled. In Federal Courts, as a rule of procedure, when a defendant is being illegally detained, any confession which he may make is inadmissible into evidence regardless of any other circumstances. **Mallory v. U.S.**, 354 U.S. 499, 41 L.Ed.

2d 1479 (1957); **McNabb v. U.S.**, 318 U.S. 332; 87 L.Ed. 819 (1942). However, the mere fact of illegal incarceration does not render a confession made by a defendant in a state criminal prosecution inadmissible into evidence. **Stein v. New York**, 346 U.S. 156, 97 L.Ed. 1522 (1953); **Crooker v. California**, 357 U.S. 433, 2 L.Ed. 2d 1448, reh. den., 358 U.S. 858, 3 L.Ed. 2d 92 (1958) **Fikes v. Alabama**, 352 U. S. 191, 1 L.Ed. 2d 246 (1957). In order that a confession be inadmissible in state court, it is necessary that it be the result of coercion, eiher physical or mental. **Chambers v. Florida**, 309 U.S. 227, 84 L.Ed. 716 (1940); **Watts v. Indiana**, 338 U.S. 49; 93 L.Ed. 1801 (1949).

In order to determine the presence or absence of coercion in the case at bar it is necessary to carefully examine the record. The defendant was taken into custody at about 10:00 A.M. on July 17, 1958 (R. 25). He was taken to the Douglasville jail, and questioned by several officers around noon (R. 23, 35, 41). He was not placed in a cell (R. 28). He called a friend about 11:45 A.M. (R.56) and requested that she come to the jail. He was again questioned later in the afternoon and made a confession as to the crime. (R. 25, 36, 62)

This statement was made freely and voluntarily and he was not placed in fear of bodily harm or promised any reward (R. 25, 26, 37). He was advised that he had a right to have an attorney and also that he did not have to make a statement (R. 38) and he stated that he did not need an attorney (R. 63). Under these facts, it cannot be said that the defendant's

confession was in any way coerced. "The bare fact of police detention and police examination in private of one in official state custody does not render involuntary a confesssion by one so detained ... Neither does an admonition by the police to tell the truth ... Nor the failure of the state authorities to comply with local statutes requiring an accused promptly be brought before a magistrate." **Crooker v. California,** 357 U.S. 433, 2 L.Ed. 2d 1448 (1958).

Here the defendant was taken into custody and made a confession within six hours, not under any coercion of any kind. The facts show that he also confessed the killing to his fiancee during a later conversation at the county jail. This certainly shows that was no coercion or improper conduct in the obtaining of the confession.

Georgia Code Section 27-212 cited by counsel is not applicable to this case as there was a warrant issued for the defendant in this case. It should be pointed out that the issue of fact concerning any illegal detention was determined in the habeas corpus proceeding mentioned in the argument of counsel for petitioner and that judgment was not appealed from nor was any of the record of that proceeding included in the record of this trial; nor is it in the transcript of the record before this Court; nor is there any evidence of illegal detention of the prisoner anywhere in the transcript.

IV. The action of the Supreme Court of Georgia in requesting an approved Brief of Evidence as required by Georgia Law before

disturbing determinations of fact made by the Trial Court is not violative of any rights guaranteed to the defendant under the Federal Constitution.

In order to understand the defendant's contention with reference to the alleged error of the Georgia Supreme Court in failing to acquire the report of the evidence, the affidavits and the countershowing of the State on the motion for new trial mentioned in the Clerk's Certificate (R.72), it is necessary to briefly review the Georgia procedure on appeal. Under Georgia Law, it is the duty of the appealing party to specify what portions of the record and evidence are to be sent up on appeal. (Ga. Code Anno. Sections 6-801; 6-803) However, "evidence, whether in the form of affidavits, documents or otherwise, is not a part of the record and cannot be merely specified and sent up as such, but must either be included in the Bill of exceptions, attached thereto as an exhibit and identified by the trial judge or included in a brief of evidence approved by the trial court and sent up as a part of the record." Ga. Practice and Procedure Section 23-12.

Where a brief of evidence has not been approved by the trial court, the appellate court cannot consider assignments of error relating thereto, even though the clerk of the trial court has sent the unapproved record to the appellate court. **Nail v. Nail, Exec.,** 212 Ga. 299, 92 S. E. 2d 109 (1956). And where documents or other evidence are not approved by the trial judge, the appellate court cannot consider any

allegations of error relating to such evidence and will assume that the judgment in connection therewith is correct and affirm it. **Giles v. Peachtree Pantries, Inc. et al.**, 209 Ga. 536, 74 S.E. 2d 545 (1952).

In his bill of exception in the case at bar, the defendant specifies as a necessary part of the record "The motion for new trial with amendment thereto and all entries and orders thereon, with order overruling said motion as amended, dated February 3rd, 1959" (R. 2). The defendant by this specification does not even request any portion of the evidence adduced at the hearing on the motion for a new trial. Defendant in his motion for rehearing requests that copies of "such record as appear to be necessary in order to fully and fairly adjudicate the questions at issue and alleged errors," be transmitted from the trial court (R. 80). However, the documents which defendant argues in his brief in this Court, should have been transmitted, **were not a part of the record** and under Georgia Law could not become a part of the record (R. 78). **McCrary v. State**, 215 Ga. 887, _____ S.E. 2d _____ (1960) cited by the defendant differs vastly from the case at bar, for in the former case, the Supreme Court of Georgia directed the transmission of a traverse of the State to withdraw a plea, a pleading in the case and not evidence as was requested in this case. In any event, in the **McCrary** case, the Supreme Court of Georgia predicated no part of its ruling upon the disputed traverse. See 215 Ga. 881, 892, _____ S.E. 2d ____, ____ (1960).

Under these circumstances, the Supreme Court of Georgia was following its own procedure, and certainly violated no Federal constitutional rights of the defendant. **Enterprise Irrigation District v. Farmers Mutual Canal Co.,** 243 U.S. 157, 61 L.Ed. 644 (1917) Cf. **NAACP v. Alabama,** 357 U.S. 449, 2 L.Ed. 2d 1488 (1958).

V. There is no showing in the record that any of the Jurors were disqualified to serve as such, and hence there is no merit in the defendant's contentions in this regard.

The defendant further contends that there was a violation of his Federal constitutional rights because certain jurors were related to the Solicitor General, and also certain jurors were prejudiced and biased. The contention with regard to the relationship to the Solicitor General can be disposed of summarily, since it is based upon an interpretation of Georgia Code Section 59-716, and the Georgia Courts have decided this contention adversely to the defendant (R 76), a determination of State law which is binding upon this court. **Williams v. Kaiser,** 323 U.S. 471, 89 L.Ed. 391 (1944).

With regard to the alleged bias and prejudice on the part of certain jurors, the only evidence that appears in the record in this regard is in the affidavit of the defense counsel, where prejudice is alleged based on fourth-hand hearsay (R. 13). This would seem to amply justify the Supreme Court of Georgia in accepting the order of the trial judge that there was no evidence of bias or prejudice (R. 15-16). And since the Supreme Court of Georgia, did not pass

upon this issue (see R. 76, 77), the defendant cannot be said to have been denied a right by the decision of that court. **Dewey v. Des Moines,** 173 U.S. 193, 43 L.Ed. 665 (1899).

CONCLUSION

An examination of the complete record in this case shows that the defendant herein committed a brutal and wanton murder—a crime to which he confessed freely and voluntarily, not only to police officers but to his own fiancee. He was given the full protection guaranteed him by the laws and Constitution of both Georgia and the United States, and has been duly convicted and now must pay the penalty for his crime. For the reasons stated above, it is respectfully submitted the judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1960.

Billy Ferguson, Appellant, v. Georgia.	On Appeal From the Supreme Court of the State of Georgia.

[March 27, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

The State of Georgia is the only State—indeed, apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial. Georgia in 1866 abolished by statute the common-law rules of incompetency for most other persons. However, the statute, now Georgia Code § 38–416, expressly retained the incompetency rule as to persons "charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction . . . ." Two years later, in 1868, Georgia allowed the criminal defendant to make an unsworn statement. The statute enacted for that purpose, as amended, is now Georgia Code § 38–415, and provides: "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer."

In this case a jury in the Superior Court, Douglas County, Georgia, convicted the appellant of murder, and

he is under sentence of death. After the State rested its case at the trial, the appellant's counsel called him to the stand, but the trial judge sustained the State's objection to counsel's attempt to question him. To the argument that to deny counsel the "right to ask the defendant any questions on the stand . . . violates . . . [Amendment] VI. . . . [and] . . . the Fourteenth Amendment to the Constitution of the United States . . . [because] it deprives the defendant of the benefit of his counsel asking him questions at the most important period of the trial. . . ," the trial judge answered that under § 38–415, ". . . you do not have the right to do anything more than instruct your client as to his rights, and . . . you have no right to question him on direct examination." In affirming the conviction and sustaining this ruling, the Supreme Court of Georgia said:

> "The constitutional provisions granting to persons charged with crime the benefit and assistance of counsel confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel. It has been repeatedly held by this court that counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury." 215 Ga. 117, 119.

On appeal brought here under 28 U. S. C. § 1257 (2), we noted probable jurisdiction. 362 U. S. 901.

The only question which the appellant properly brings before us is whether this application by the Georgia courts of § 38–415 denied the appellant "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama*, 287 U. S. 45, 69, within the require-

ments of due process in that regard as imposed upon the States by the Fourteenth Amendment. See also *Chandler* v. *Fretag*, 348 U. S. 3.

Appellant raises no question as to the constitutional validity of § 38–416, the incompetency statute.[1] However, decision of the question which is raised under § 38–415 necessarily involves consideration of both statutes. Historically these provisions have been intertwined. For § 38–416 is a statutory declaration of the common-law rule disqualifying criminal defendants from testifying, and § 38–415, also with its roots in the common law, was an attempt to mitigate the rigors of that incompetency.

The disqualification of parties as witnesses characterized the common law for centuries. Wigmore traces its remote origins to the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law. See 2 Wigmore, Evidence, pp. 674–683. Under those old forms, the oath itself was a means of decision. See Thayer, Preliminary Treatise on Evidence, pp. 24–34. Jury trial replaced decision by oath with decision of the jurors based on the evidence of witnesses; with this change "[T]he party was naturally deemed incapable of being

[1] It is suggested in the concurring opinions that we should nevertheless adjudicate the validity of § 38–416. Apart from the incongruity of passing upon the statute the appellant expressly refrained from attacking, and disregarding his challenge to the statute he did call in question, such a course would be disrespectful of the state's procedures. For it appears that the Georgia Supreme Court would not have entertained an attack on § 38–416, since the appellant did not offer himself to be sworn as a witness. See *Holley* v. *Lawrence*, 194 Ga. 529; appeal here was dismissed on the express ground that "the judgment of the court below rests upon a non-federal ground adequate to support it, namely, that the failure to tender such testimony at the trial barred any later claim of the alleged constitutional right . . . ." 317 U. S. 518.

such a witness." 2 Wigmore, p. 682. Incompetency of the parties in civil cases seems to have been established by the end of the sixteenth century. See 9 Holdsworth, History of English Law, p. 194. In time the principal rationale of the rule became the possible untrustworthiness of the party's testimony; for the same reason disqualification was applied in the seventeenth century to interested nonparty witnesses.[1]

Its firm establishment for criminal defendants seems to have come somewhat later. In the sixteenth century it was necessary for an accused to conduct his own defense, since he was neither allowed to call witnesses in his behalf nor permitted the assistance of counsel. 1 Stephen, History of the Criminal Law of England, p. 350. The criminal trial of this period has been described as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with utmost eagerness and closeness of reasoning." Stephen, *supra*, p. 326. In the process the defendant could offer by way of explanation material that would later be characterized as testimony. 2 Wigmore, p. 684. In the seventeenth century, however, he was allowed to call witnesses in his behalf; the right to have them sworn was accorded by statute for treason in 1695 and for all felony in 1701. 7 Will. III, c. 3; 1 Anne, St. 2, c. 9. See Thayer, *supra*, pp. 157–161, and n. 4; 2 Wigmore, pp. 685–686. A distinction was drawn be-

[1] Wigmore concludes that "the principle of parties' disqualification would have been the direct root of the disqualification by interest in general." 2 Wigmore, p. 680. "[A]fter Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general." Pp. 682–683. Coke listed a number of disqualifications: "if the witness becometh infamous, . . . Or if the witnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like." Coke on Littleton, 6a.

tween the accused and his witnesses—they gave evidence but he did not. See 2 Wigmore, pp. 684–685, and n. 42; 9 Holdsworth, *supra*, pp. 195–196. The general acceptance of the interest rationale as a basis for disqualification reinforced this distinction, since the criminal defendant was, of course, *par excellence* an interested witness. "The old common law shuddered at the idea of any person testifying who had the least interest." *State* v. *Barrows*, 76 Me. 401, 409. See *Benson* v. *United States*, 146 U. S. 325, 336–337.

Disqualification for interest was thus extensive in the common law when this Nation was formed. 3 Bl. Comm. 369.[1] Here, as in England, criminal defendants were deemed incompetent as witnesses. In *Rex* v. *Lukens*, 1 Dall. 5, 6, decided in 1762, a Pennsylvania court refused to swear a defendant as a witness, holding that the issue there in question "must be proved by indifferent witnesses." Georgia by statute adopted the common law of England in 1784, and ". . . the rules of evidence belonging to it . . . [were] . . . in force there . . . ." *Doe* v. *Winn*, 5 Pet. 233, 241. Georgia therefore followed the incompetency rule for criminal defendants long before it was given statutory form by the Act of 1866. See *Jones* v. *State*, 1 Ga. 610; *Roberts* v. *State*, 189 Ga. 36, 40–41.[2]

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[1] There Blackstone stated the then-settled common-law rule to be that "[a]ll witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause."

[2] By the Act of February 25, 1784, the Georgia Legislature provided that the common laws of England should remain in force in Georgia, "so far as they are not contrary to the constitution, laws, and form of government now established in this State." Prince's Digest (1837), p. 570. Section 3772 of the Code of 1863, which codified the statutory and decisional law of the State, stated: "Witnesses are incompetent . . . Who are interested in the event of the suit."

Broadside assaults upon the entire structure of disqualifications, particularly the disqualification for interest, were launched early in the nineteenth century in both England and America. Bentham led the movement for reform in England, contending always for rules that would not exclude but would let in the truth. See Rationale of Judicial Evidence, bk. IX, pt. III, c. 3 (Bowring ed.), pp. 393–406. The basic ground of the attack was, as Macaulay said, that "[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals." Lord Macaulay's Legislative Minutes, 1835, pp. 127–128. The qualification in civil cases of nonparty witnesses despite interest came first. See Lord Denman's Act of 1843, 6 & 7 Vict., c. 85. The first general exception in England for party witnesses in civil cases was the County Courts Act of 1846, 9 & 10 Vict., c. 95, although there had been earlier grants of capacity in certain other courts. Best, Evidence (Lely ed. 1893), pp. 158–159. Lord Brougham's Act of 1851, 14 & 15 Vict., c. 99, virtually abolished the incompetency of parties in civil cases.[5]

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[5] The history of the transition in one American jurisdiction is traced in Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1. The first American statute removing the disability of interested nonparty witnesses seems to have been Michigan's in 1846, and Connecticut was first to abolish the general incapacity of parties, in 1849. The Field reforms in New York State were influential in leading other American jurisdictions to discard the incapacity of both witnesses and parties in civil cases. For an account of the development in the United States, see 2 Wigmore, pp. 686–695.

The preamble to the 1866 Georgia legislation expressed the legislative aim in extending competency: "Whereas, the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in civil and criminal cases, should be laid before the persons

The qualification of criminal defendants to give sworn evidence if they wished came last. The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. Maine Acts 1859, c. 104. This was followed in Maine in 1864 by the enactment of a general competency statute for criminal defendants, the first such statute in the English-speaking world. The reform was largely the work of John Appleton of the Supreme Court of Maine, an American disciple of Bentham. Within 20 years most of the States now comprising the Union had followed Maine's lead. A federal statute to the same effect was adopted in 1878, 20 Stat. 30, 18 U. S. C. § 3481. Before the end of

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who are to decide upon them, and that such persons should exercise their judgment on the *credit* of the witnesses adduced for the truth of testimony." The first section of the Act forbade the exclusion of witnesses, "by reason of incapacity from crime or interest, or from being a party"; it also contained a "dead man's statute" proviso. The remaining sections enumerated the exceptions to the extension of competency; they were in effect a statutory declaration that certain of the common-law incapacities should remain intact. See *Roberts* v. *State*, 189 Ga. 36; *Wilson* v. *State*, 138 Ga. 489, 492; *Howard* v. *State*, 94 Ga. 587. The second section contained the original of § 38-416, stating: "But nothing herein contained shall render any person, who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable, to give evidence for or against himself, or herself, or shall render any person compellable to answer any question tending to criminate himself or herself; or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband; nor shall any attorney be compellable to give evidence for or against his client." Ga. Laws 1866, pp. 138-139. Save for the provision as to the attorney-client privilege, added during the debate in the Georgia Senate, see Senate Journal, Dec. 5, 1866, p. 266, the second section was verbatim the same as § 3 of Lord Brougham's Act.

the century every State except Georgia had abolished the disqualification.[6]

Common-law jurisdictions outside the United States also long ago abolished the disqualification. This change came in England with the enactment in 1898 of the Criminal Evidence Act, 61 & 62 Vict., c. 36.[7] Various States of Australia had enacted competency statutes even before the mother country, as did Canada and New Zealand. Competency was extended to defendants in Northern Ireland in 1923, in the Republic of Ireland in 1924, and in India in 1955.[8]

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[6] The dates on which the general competency statutes of the States were enacted are: Alabama, 1885; Alaska, 1899; Arizona, 1871; Arkansas, 1885; California, 1866; Colorado, 1872; Connecticut, 1867; Delaware, 1893; Florida, 1895; Hawaii, 1876; Idaho, 1875; Illinois, 1874; Indiana, 1873; Iowa, 1878; Kansas, 1871; Kentucky, 1886; Louisiana, 1886; Maine, 1864; Maryland, 1876; Massachusetts, 1866; Michigan, 1881; Minnesota, 1868; Mississippi, 1882; Missouri, 1877; Montana, 1872; Nebraska, 1873; Nevada, 1867; New Hampshire, 1869; New Jersey, 1871; New Mexico, 1880; New York, 1869; North Carolina, 1881; North Dakota, 1879; Ohio, 1867; Oklahoma, 1890; Oregon, 1880; Pennsylvania, 1885; Rhode Island, 1871; South Carolina, 1866; South Dakota, 1879; Tennessee, 1887; Texas, 1889; Utah, 1878; Vermont, 1866; Virginia, 1886; Washington, 1871; West Virginia, 1881; Wisconsin, 1869; Wyoming, 1877.

The current citations to these statutes are collected in the Appendix to this opinion.

[7] Parliament had enacted a number of specialized competency statutes prior to 1898, the first in 1872. About 25 others had been passed by the time of the enactment of the general competency statute. See 56 Hansard, Parliamentary Debates, 4th Series, pp. 977–978. The most important was the Criminal Law Amendment Act of 1885, which made defendants competent in certain felony prosecutions. Most of the other statutes involved offenses created by regulatory legislation, which were generally misdemeanors. See generally Best, *supra*, pp. 571–572; 2 Taylor, Evidence (12th ed.), 862–863.

[8] Canada and New Zealand adopted competency statutes in 1893. Canada Evidence Act, see Rev. Stat. Can. (1952), c. 307, § 4 (1). New Zealand Criminal Code Act, § 398, see N. Z. Repr. Stat., Evi-

The lag in the grant of competency to the criminally accused was attributable in large measure to opposition from those who believed that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence. "[I]f we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation. . . . [It would result in] . . . the degradation of our criminal jurisprudence by converting it into an inquisitory system, from which we have thus far been happily delivered." *People* v. *Thomas*, 9 Mich. 314, 320–321 (concurring opinion). See also *Ruloff* v. *People*, 45 N. Y. 213, 221–222; *People* v. *Tyler*, 36 Cal. 522, 528–530; *State* v. *Cameron*, 40 Vt. 555, 565–566; 1 Am. L. Rev. 443; Maury, Validity of Statutes Authorizing the Accused to Testify, 14 Am. L. Rev. 748, 753.[9]

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dence Act 1908, § 5. For an account of the Australian development, see 6 Res Judicatae 60. The statute in Northern Ireland is the Criminal Evidence Act (Northern Ireland); the Irish statute is the Criminal Justice (Evidence) Act.

For the Indian statute, see Code of Criminal Procedure (Amendment) Act, 1955, § 61, in 42 A. I. Rep. [1955], Indian Acts Section p. 91.

[9] Opposition on this score was marked in Great Britain. Said one member of Parliament in the 1898 debates: "[W]hy is this change to be made in the law? The English Revolution is against it, three centuries of experience is against it; and the only argument adduced in its favor is the suggestion that an honest man is occasionally convicted of a crime of which he is innocent. . . . it would be a degradation to your great judicial tribunals that, though a guilty man may not, an innocent man may be placed in a position of embarrassment and peril—for the first time under the British Constitution—far greater than any ancient [illegible] designed." 56 Hansard, *supra*, pp. 1022, 1023. Said another: "[F]or centuries the criminal

The position of many who supported competency gave credence to these fears. Neither Bentham nor Appleton was a friend of the privilege against self-incrimination.[10] While Appleton justified competency as a necessary protection for the innocent, he also believed that incompetency had served the guilty as a shield and thus disserved the public interest. Competency, he thought, would open the accused to cross-examination and permit an unfavorable inference if he declined to take the stand to exculpate himself.[11]

This controversy left its mark on the laws of many jurisdictions which enacted competency. The majority of the competency statutes of the States forbid comment by the prosecution on the failure of an accused to testify, and provide that no presumption of guilt should arise from his failure to take the stand. The early cases particularly emphasized the importance of such limitations. See, *e. g.*, *Staples* v. *State*, 89 Tenn. 231; *Price* v. *Common-*

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law of England has been administered on the principle that if you want to hang a man you must hang him on somebody else's evidence. This is a Bill to hang a man on his own evidence . . . ." *Id.*, at 1030. There had been particular opposition on the part of Irish members, who contended that competency would become a means of oppression of defendants there; as a result Ireland was excluded from the coverage of the Act. See 60 Hansard, *supra*, pp. 721–742. Other members were hostile because of fear that the statute would have an adverse effect on laborers who became criminal defendants. See 60 Hansard, *supra*, pp. 546–547, 574–578.

[10] See Bentham, Rationale of Judicial Evidence, bk. IX, pt. 4, c. 3, pp. 445–468; Appleton, The Rules of Evidence, pp. 126–134.

[11] "That then the accused, if *guilty*, should object to being placed in an attitude so dangerous to him, *because* he is guilty, is what might have been expected . . . . His objection to testifying, is an objection to punishment." Appleton, *supra*, p. 131. See also *State* v. *Cleaves*, 59 Me. 298; *State* v. *Bartlett*, 55 Me. 200, 215–221. For a note on Appleton's role in the movement to extend competency, see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12. See also 14 Am. L. Reg. 705.

wealth, 77 Va. 393; *State* v. *Taylor*, 57 W. Va. 228, 234–235. Cf. 1 Cooley, Constitutional Limitations (8th ed.), pp. 658–661. See generally, Reeder, Comment Upon Failure of Accused to Testify, 31 Mich. L. Rev. 40. For the treatment of the accused as a witness in Canada, see 12 Can. Bar Rev. 519, 13 Can. Bar Rev. 336; in Australia, see 6 Res Judicatae 60; and in Great Britain, see 2 Taylor, Evidence (12th ed.) 864–865; 51 L. Q. Rev. 443; 58 L. Q. Rev. 369.

Experience under the American competency statutes was to change the minds of many who had opposed them. It was seen that the shutting out of his sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath. An American commentator discussing the Massachusetts statute in the first year of its operation said: "We have always been of opinion, that the law permitting criminals to testify would aid in the detection of guilt; we are now disposed to think that it will be equally serviceable for the protection of innocence." 1 Am. L. Rev. 396. See also 14 Am. L. Reg. 129.

This experience made a significant impression in England and helped to persuade Parliament to follow the American States and other common-law jurisdictions in granting competency to criminal defendants. In the debates of 1898, the Lord Chancellor quoted a distinguished English jurist, Russell Gurney: "[A]fter what he had seen there [in America], he could not entertain a doubt about the propriety of allowing accused persons to be heard as witnesses on their own behalf." 54 Hansard, *supra*, p. 1176. Arthur Balfour reported to the Commons that "precisely the same doubts and difficulties which beset the legal profession in this country on the suggestion of this change were felt in the United States, but the result of the experiment, which has been extended grad-

ually from State to State, is that all fears have proved illusory, that the legal profession, divided as they were before the change, have now become unanimous in favor of it, and that no section of the community, not even the prisoners at the bar, desire to see any alteration made in the system." 60 Hansard, *supra*, pp. 679–680.[12]

A particularly striking change of mind was that of the noted authority on the criminal law, Sir James Stephen. Writing in 1863, Stephen opposed the extension of competency to defendants. He argued that it was inherent that a defendant could not be a real witness: "[I]t is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion." A General View of the Criminal Law of England, p. 202. Competency would put a dangerous discretion in the hands of counsel. "By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt, by calling him he might expose an innocent man to a cross-examination which might make him look guilty." *Ibid.* Allowing questions about prior convictions "would indirectly put the man upon his trial for the whole of his past life." *Id.*, p. 203. Twenty years later, Stephen, after many years experience on the criminal bench, was to say: "I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. . . . A poor and ill-advised man . . . is

[12] For other comments on the impact of the competency statutes, see Alverstone, Recollections of Bar and Bench, pp. 176–180; Biron, Without Prejudice; Impressions of Life and Law, p. 218; Train, The Prisoner at the Bar, pp. 205–211; Sherman, Some Recollections of a Long Life, p. 234; 1933 Scots Law Times 29; 2 Fortnightly L. J. 11.

always liable to misapprehend the true nature of his defense, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness." 1 Stephen, History of the Criminal Law of England, pp. 442, 444.

In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case. The development of the unsworn-statement practice was itself a recognition of the harshness of the incompetency rule. While its origins antedated the nineteenth century,[13] its strong sponsorship by English judges of that century is explained by their desire for a mitigation of the rigors of that rule. Baron Alderson said: "I would *never* prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as a part of the case. If it were otherwise, the most monstrous injustice might result to prioners." *Reg.* v. *Dyer*, 1 Cox C. C. 113, 114. See also *Reg.* v. *Malings*, 8 C. & P. 242; *Reg.* v. *Walkling*, 8 C. & P.

[13] The origins probably lie in the necessity for the prisoner to defend himself during the early development of English criminal law. See p. 4, *supra*. Even after the defendant was allowed to have witnesses in his behalf in England, he still had no right to be heard by counsel, except for treason, until the act of 1836, and his participation in the trial remained of major importance; as before, "a prisoner was obliged, in the nature of the case, to speak for himself." *Reg.* v. *Doherty*, 16 Cox C. C. 306, 309. Although the practice developed in the eighteenth century of allowing counsel to advise the accused during the trial and to cross-examine the Crown's witnesses, counsel was still not permitted to address the jury. Stephen, *supra*, p. 424. The defendant continued to do this in his own behalf. See 1 Chitty, Criminal Law (5th Am. ed.), p. 623; Bentham, *supra*, bk. IX, pt. 5, c. 3, p. 496. See generally 26 Austral. L. J. 166.

243; *Reg.* v. *Manzano*, 2 F. & F. 64; *Reg.* v. *Williams*, 1 Cox C. C. 363. Judge Stephen's sponsorship of the practice was especially influential. See *Reg.* v. *Doherty*, 16 Cox C. C. 306. See also *Reg.* v. *Shimmin*, 15 Cox C. C. 122; 60 Hansard, *supra*, p. 657. It became so well established in England that it was expressly preserved in the Criminal Evidence Act of 1898.[14]

The practice apparently was followed in this country at common law in a number of States and received statutory recognition in some. Michigan passed the first such statute in 1861; unlike the Georgia statute of 1868, it provided that the prisoner should be subject to cross-examination on his statement. See *People* v. *Thomas*, 9 Mich. 314.[15] The Georgia Supreme Court, in one of the early

[14] Criminal Evidence Act, § 1 (h). Some English judges had sought to curtail the practice after defendants were statutorily accorded full benefit of counsel by the act of 1836, 6 & 7 Will. 4, c. 114. In *Reg.* v. *Boucher*, 8 C. & P. 141, Coleridge, J., held that because defense counsel had addressed the jury, the accused could not make a statement. See also *Reg.* v. *Beard*, 8 C. & P. 142; *Reg.* v. *Rider*, 8 C. & P. 539. In *Reg.* v. *Taylor*, 1 F. & F. 535, Byles, J., said that the prisoner or his counsel would be permitted to address the jury, but not both. At least a remnant of this judicial hostility to the statement lingered almost until the time of the grant of competency. See *Reg.* v. *Millhouse*, 15 Cox C. C. 622.

In addition to its statutory preservation in Great Britain, it survives in other common-law jurisdictions recognizing the defendant's competency. *E. g.*, New Zealand, see *Rex* v. *Perry*, [1920] N. Z. L. R. 21; *Kerr* v. *Reg.*, [1953] N. Z. L. R. 75, 28 N. Z. L. J. 305; Australia, see *Rex* v. *McKenna*, [1951] Q. S. R. 299; Ireland, see *People* v. *Riordan*, [1948] I. R. 416, 94 Irish Law Times, Feb. 20, 1960, p. 43, Feb. 27, 1960, p. 49, March 5, 1960, p. 55; South Africa, see *Rex* v. *de Wet*, [1933] S. A. L. R. 68, 64 So. Afr. L. J. 374.

[15] In some States recognizing the statement at common law, the defendant was confined to arguing the law and commenting on the evidence of the witnesses; he could not state facts. See *Ford* v. *State*, 34 Ark. 649; *Wilson* v. *State*, 50 Tenn. 232. In other States, the prisoner appears to have been allowed more latitude. See *People* v. *Lopez*, 2 Edmonds' Sel. Cases 262 (N. Y.): In Massachusetts, the

decisions considering the unsworn-statement statute, stressed the degree of amelioration expected to be realized from the practice, thereby implicitly acknowledging the disadvantages for the defendant of the incompetency rule. The Court emphasized "the broad and liberal purpose which the legislature intended to accomplish. . . . This right granted to the prisoner is a modern innovation upon the criminal jurisprudence of the common law, advancing to a degree hitherto unknown the right of the prisoner *to give his own narrative* of the accusation against him to the jurors, who are permitted to believe it in preference to the sworn testimony of the witnesses." *Coxwell* v. *State*, 66 Ga. 309, 316–317.[18]

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right of a defendant with counsel to make a statement seems to have been recognized only in capital cases. See the historical review in *Commonwealth* v. *Stewart*, 255 Mass. 9; see also *Commonwealth* v. *McConnell*, 162 Mass. 499; *Commonwealth* v. *Burrough*, 162 Mass. 513; *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 32. For other considerations of the common-law statement, see *State* v. *Taylor*, 57 W. Va. 228; *Hanoff* v. *State*, 37 O. S. 178, 184–185; *O'Loughlin* v. *People*, 90 Colo. 368, 384–385; *State* v. *Louviere*, 169 La. 109; cf. *Reg.* v. *Rogers*, [1888] 1 B. C. L. R. pt. 2, p. 119. Alabama gave the unsworn statement statutory sanction in 1882. Previously the right had been confined there to an argument on the evidence, *State* v. *McCall*, 4 Ala. 643, but the statute was construed to allow the statement of matters in the nature of evidence. See *Blackburn* v. *State*, 71 Ala. 319; *Chappell* v. *State*, 71 Ala. 322. Wyoming gave a statutory right of unsworn statement in 1869. See *Anderson* v. *State*, 27 Wyo. 345. Florida in 1866 gave the accused in the discretion of the court an opportunity to make a sworn statement on which he could not be cross-examined. This was made an absolute right in 1870. See *Miller* v. *Florida*, 15 Fla. 577. All these States, of course, subsequently made defendants fully competent.

[18] It is doubtful how far the practice had been followed at common law in Georgia. See *Roberts* v. *State*, 189 Ga. 36, 41. Initially there seems to have been considerable opposition to giving the unsworn statement statutory sanction. The bill that became the predecessor of present § 38–415 was originally tabled in the House and then passed after reconsideration, and was originally defeated in the

But the unsworn statement was recognized almost everywhere else as simply a stopgap solution for the serious difficulties for the accused created by the incompetency rule. "The system of allowing a prisoner to make a statement had been introduced as a mere makeshift, by way of mitigating the intolerable hardship which occasionally resulted from the prisoner not being able to speak on his own behalf." 60 Hansard, *supra*, p. 651. "The custom grew up in England out of a spirit of fairness to give an accused, who was otherwise disqualified, an opportunity to tell his story in exculpation." *State* v. *Louviere*, 169 La. 109, 119. The abolition of the incompetency rule was therefore held in many jurisdictions also to abolish the unsworn-statement practice. "In such cases the unsworn statement of an accused becomes secondary to his right of testifying under oath and cannot be received." *State* v. *Louviere*, *supra*, p. 119. "The privilege was granted to prisoners because they were debarred from giving evidence on oath, and for that reason alone. When the law was changed and the right accorded to them to tell their story on oath as any other witness the reason for making an unsworn statement was removed." *Rex* v. *Krafchenko*, [1914] 17 D. L. R. 244, 250 (Man. K. B.).[17]

Senate. See House Journal, Aug. 8, 10, 13, 1868, pp. 158, 160, 173; Senate Journal, Oct. 3, 1868, p. 492. As passed, it provided that in cases of felony the prisoner should have the right to make an unsworn statement; he was not subject to cross-examination on it and the jury was empowered to give it such force as they thought right. Ga. Laws 1868, p. 24. In 1874 the right was extended to all criminal defendants. Ga. Laws 1874, pp. 22–23. In 1879 the jury was explicitly empowered to believe the statement in preference to the sworn testimony. Ga. Laws 1878–1879, pp. 53–54, and the statute took its present form.

[17] See also *Clarke* v. *State*, 78 Ala. 474; *Harris* v. *State*, 78 Ala. 482; *Hart* v. *State*, 38 Fla. 39; *Copeland* v. *State*, 41 Fla. 320; *O'Loughlin* v. *People*, 90 Colo. 368.

In Wyoming, the defendant had the option to make an unsworn

Where the practice survives outside America, little value has been attached to it. "If the accused does not elect to call any evidence or to give evidence himself, he very often makes an unsworn statement from the dock. It is well understood among lawyers that such a statement has but little evidential value compared with the sworn testimony upon which the accused can be cross-examined, ..." *Rex* v. *Zware*, [1946] S. A. L. R. 1, 7–8. "How is a jury to understand that it is to take the statement for what it is worth, if it is told that it cannot regard it as evidence (*i. e.*, proof) of the facts alleged?" 68 L. Q. Rev. 463. The unsworn statement "is seldom of much value, since it is generally incoherent and leaves open many doubts which cannot be resolved by cross-examination." 69 L. Q. Rev. 22, 25. "The right of a prisoner to make an unsworn statement from the dock still exists . . . but with greatly discounted value." 1933 Scots Law Times 29. Commentators and judges in jurisdictions with statutory competency have suggested abrogation of the unsworn-statement right. See 94 Irish Law Times, March 5, 1960, p. 56; 68 L. Q. Rev. 463; *Rex* v. *McKenna*, [1951] Q. S. R. 299, 308.

Georgia judges, on occasion, have similarly disparaged the unsworn statement. "Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief." *Bird* v. *State*, 50 Ga. 585, 589. "The statement stands upon a peculiar footing. It is often introduced for the mere purpose of explaining

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statement even after the grant of competency, since the competency statute expressly preserved the statement. In 1925 the reservation of the right of statement was removed. See *Anderson* v. *State*, 27 Wyo. 345. Massachusetts thus appears to be the only American jurisdiction still explicitly allowing a defendant in some cases to give either sworn testimony or an unsworn statement. See *Commonwealth* v. *Stewart*, 255 Mass. 9.

evidence, or as an attempt at mitigation; the accused and his counsel throw it in for what it may happen to be worth and do not rely upon it as a substantive ground for acquittal." *Underwood* v. *State*, 88 Ga. 47, 51.

The unsworn statement has anomalous characteristics in Georgia practice. It is not treated as evidence or like the testimony of the ordinary sworn witness. "The statement may have the effect of explaining, supporting, weakening or overcoming the evidence, but still it is something different from the evidence, and to confound one with the other, either explicitly or implicitly, would be confusing and often misleading. . . . The jury are to deal with it on the plane of statement and not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it; it is a legal blank. The jury may stamp it with such value as they think belongs to it." *Vaughn* v. *State*, 88 Ga. 731, 739. Because the statement is not evidence, even the charge in the strict terms of the statute favored by the Georgia Supreme Court, see *Garrett* v. *State*, 203 Ga. 756, 765; *Emmett* v. *State*, 195 Ga. 517, 541, calls attention to the fact that the defendant is not under oath. Moreover, charge after charge going beyond the terms of the statute has been sustained. Thus in *Garrett* v. *State*, *supra*, the trial judge instructed that while the defendants were "allowed" to make a statement, "they are not under oath, not subject to cross-examination, and you are authorized to give to their statement just such weight and credit as you think them entitled to receive." In *Emmett* v. *State*, *supra*, the instruction was that the statement might be believed in preference to the sworn testimony "if you see proper to give it that weight and that place and that importance in the trial of this case." In *Douberly* v. *State*, 184 Ga. 573, the jury were told they might credit the statement "provided they believe it to be true." In *Allen* v. *State*, 194 Ga. 430, the charge was: "There is no

presumption attached to the defendant's statement. No presumption that it is true, nor any presumption that it is not true. In other words it goes to you without a presumption either for or against him: You have the right to reject the statement entirely if you do not believe it to be true." In many cases the trial judges have been sustained in specifically pointing out that defendants were not subject to the sanction for perjury with respect to their unsworn statements. "[I]f he failed to tell you the truth, he incurred no penalty by reason of such failure." *Darden* v. *State*, 171 Ga. 160. "The defendant's statement is not under oath; no penalty is prescribed for making a false statement . . . ." *Klug* v. *State*, 77 Ga. 734. "Surely there can be no wrong in calling the attention of the jury to circumstances which should impair the force of such testimony or which should enable them to give it the weight to which it is entitled." *Poppell* v. *State*, 71 Ga. 276. See also *Grimes* v. *State*, 204 Ga. 854; *Thurmond* v. *State*, 198 Ga. 410; *Willingham* v. *State*, 169 Ga. 142; *Millen* v. [illegible], 175 Ga. 283.

Because it is not evidence, the statement is not a foundation supporting the offer of corroborative evidence. *Chapman* v. *State*, 155 Ga. 393; *Medlin* v. *State*, 149 Ga. 23. "The statute is silent as to corroborating the mere statement of the accused, and while it allows the jury to believe it in preference to the sworn testimony, it seems to contemplate that the statement shall compete with sworn testimony single-handed, and not that it shall have the advantage of being reinforced by facts which do not weaken the sworn evidence otherwise than by strengthening the statement opposed to it." *Vaughn* v. *State*, 88 Ga. 731, 736. Similarly the statement is not an independent basis for authenticating and introducing documents. *Sides* v. *State*, 213 Ga. 482; see also *Register* v. *State*, 10 Ga. App. 623. In the absence of a specific request, the trial judge need not charge the law applicable

to a defense presented by the statement but not supported in sworn testimony. *Prater* v. *State*, 160 Ga. 138, 143; *Cofer* v. *State*, 213 Ga. 22; *Willingham* v. *State*, 169 Ga. 142; *Holleman* v. *State*, 171 Ga. 200; *Darby* v. *State*, 79 Ga. 63. In contrast the trial judge may *sua sponte* instruct the jury to treat the accused's explanation as not presenting a defense in law; "[i]n proper cases the jury may be guarded by a charge from the court against giving the statement an undue effect in favor of the prisoner . . . ." *Underwood* v. *State*, 88 Ga. 47, 51; *Fry* v. *State*, 81 Ga. 645.

It is said that an advantage of substance which the defendant may realize from the distinction is that the contents of his statement are not circumscribed by the ordinary exclusionary rules of evidence. *Prater* v. *State*, 160 Ga. 138, 142–147; *Richardson* v. *State*, 3 Ga. App. 313; *Birdsong* v. *State*, 55 Ga. App. 730; *Tiget* v. *State*, 110 Ga. 244. However, "The prisoner must have some regard to relevancy and the rules of evidence, for it was never intended that in giving his narrative of matters pertaining to his defense he should attempt to get before the jury wholly immaterial facts or attempt to bolster up his unsworn statement by making profert of documents, letters, or the like, which if relevant might be introduced in evidence on proof of their genuineness." *Nero* v. *State*, 126 Ga. 554, 555. See also *Saunders* v. *State*, 172 Ga. 770; *Montross* v. *State*, 72 Ga. 261; *Theis* v. *State*, 45 Ga. App. 364; *Vincent* v. *State*, 153 Ga. 278, 293–294.

The situations in which the Georgia cases do assimilate the defendant to an ordinary witness emphasize the anomalous nature of the unsworn statement. If he admits relevant facts in his statement the prosecution is relieved of the necessity of proving them by evidence of its own. "The prisoner's admission in open court, made as a part of his statement on the trial, may be treated by

the jury as direct evidence as to the facts." *Hargroves* v. *State*, 179 Ga. 722, 725. "It is well settled that the statement of a defendant to a jury is a statement made in judicio and is binding on him. Where the defendant makes an admission of a fact in his statement, such admission is direct evidence, and the State need not prove such fact by any other evidence." *Barbour* v. *State*, 66 Ga. App. 498, 499; *Dumas* v. *State*, 62 Ga. 58. And admissions in a statement will open the door to introduction of prosecution evidence which might otherwise be inadmissible. *McCoy* v. *State*, 124 Ga. 218. Admissions in a statement at one trial are admissible against the accused in a later trial. *Cady* v. *State*, 198 Ga. 99, 110; *Dumas* v. *State*, *supra*. The prosecution may comment on anything he says in the statement. *Frank* v. *State*, 141 Ga. 243, 277. Although it has been held that the mere making of a statement does not put the defendant's character in issue, *Doyle* v. *State*, 77 Ga. 513, it is settled that "A defendant's statement may be contradicted by testimony as to the facts it narrates, and his character may be as effectively put in issue by his statement as by witnesses sworn by him for this purpose." *Jackson* v. *State*, 204 Ga. 47, 56; *Barnes* v. *State*, 24 Ga. App. 372. The prosecution may introduce rebuttal evidence of alleged false statements. *Johnson* v. *State*, 186 Ga. 324; *Camp* v. *State*, 179 Ga. 292; *Morris* v. *State*, 177 Ga. 106.

Perhaps any adverse consequences resulting from these anomalous characteristics might be in some measure overcome if the defendant could be assured of the opportunity to try to exculpate himself by an explanation delivered in an organized, complete and coherent way. But the Georgia practice puts obstacles in the way of this. He must deliver a finished and persuasive statement on his first attempt, for he will probably not be permitted to supplement it. Apparently the situation must be most unusual before the exercise by the trial judge of his dis-

cretion to refuse to permit the defendant to make a supplemental statement will be set aside. See *Sharp* v. *State*, 111 Ga. 176; *Jones* v. *State*, 12 Ga. App. 133. Even after the State has introduced new evidence to rebut the statement or to supplement its own case, leave to make a supplemental statement has been denied. *Fairfield* v. *State*, 155 Ga. 660; *Johnson* v. *State*, 120 Ga. 509; *Knox* v. *State*, 112 Ga. 373; *Boston* v. *State*, 95 Ga. 590; *Garmon* v. *State*, 24 Ga. App. 586. If the subject matter of the supplementary statement originates with counsel and not with the defendant, it has been held that this is sufficient reason to refuse to permit the making of a supplemental statement. *August* v. *State*, 20 Ga. App. 168. And the defendant who may have a persuasive explanation to give has no effective way of overcoming the possible prejudice from the fact that he may not be subjected to cross-examination without his consent, for he has no right to require cross-examination. *Boyers* v. *State*, 198 Ga. 838, 844–845. Of course, even in jurisdictions which have granted competence to defendants, the prosecution may decline to cross-examine. But at least the defendants in those jurisdictions have had the advantage of having their explanation elicited through direct examination by counsel. In Georgia, however, as was held in this case, counsel may not examine his client on direct examination except in the discretion of the trial judge. The refusal to allow counsel to ask questions rarely seems to be reversible error. See, *e. g.*, *Corbin* v. *State*, 212 Ga. 231; *Brown* v. *State*, 58 Ga. 212. "This discretion is to be sparingly exercised, but its exercise will not be controlled, except in cases of manifest abuse." *Whitley* v. *State*, 14 Ga. App. 577, 578. Indeed, even where the defendant has been cross-examined on his statement, it has been held that defense counsel has no right to ask a question, *Lindsay* v. *State*, 138 Ga. 818. Nor may counsel call the attention of the defendant to a material omission in his

statement without permission of the trial court." *Echols* v. *State*, 109 Ga. 508; *Clark* v. *State*, 43 Ga. App. 384.

This survey of the unsworn-statement practice in Georgia supports the conclusion of a Georgia commentator: "The fact is that when the average defendant is placed in the witness chair and told by his counsel or the court that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful." 7 Ga. B. J. 432, 433 (1945).[18]

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[18] For other Georgia comments on the practice, see 17 Ga. B. J. 120; 15 Ga. B. J. 342; 14 Ga. B. J. 362, 366; 3 Mercer L. Rev. 334; cf. 5 Ga. B. J., Feb. 1943, p. 47. The Georgia Bar Association has in the past supported a proposal in the legislature to make defendants competent. See, *e. g.*, 1952 Ga. Bar Assn. Rep. 31. The most recent study of the problem by the Association's Committee on Criminal Law and Procedure resulted in a report recommending against change on grounds that it would "aid the prosecution and conviction of the defendant and would be of no material benefit to any defendant in a criminal case. Those who are on trial for their lives and liberty cannot possibly think and testify as clearly as a disinterested witness, and of course, it is agreed that a shrewd prosecutor could create, by expert cross examination, in the minds of the jury, an unfavorable impression of a defendant." 1957 Ga. Bar Assn. Rep. 182.

Georgia's adherence to the rule of incompetency of criminal defendants contrasts with the undeviating trend away from exclusion of evidence that has characterized the development of the State's law since the nineteenth century. The Code of 1863 indicates that the limitations on and exceptions to disqualifications in the common law were numerous even before the Act of 1866. See, *e. g.*, §§ 3772 (5), 3779, 3780, 3781, 3782, 3783, 3785, 4563. The Georgia Arbitration Act of 1856 had made the parties competent in arbitration proceedings. See *Golden* v. *Fowler*, 26 Ga. 451, 458. Judge Lumpkin declared: "[A]s jurors have become more capable of exercising their functions intelligently, the Judges both in England and in this country, are struggling constantly to open the door wide as possible . . . to let in all facts calculated to affect the minds of the jury in arriving

The tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of counsel." *Powell* v. *Alabama*, *supra*, p. 69, he may fail properly to introduce, or to introduce at all, what may be a perfect defense. ". . . though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Ibid.*

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at a correct conclusion. . . ." Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict." *Johnson* v. *State*, 14 Ga. 55, 61–62.

A policy favoring the reception of evidence has consistently characterized the decisions of the Georgia courts and Acts of the legislature since the 1866 Act. See, *e. g.*, *Blount* v. *Beall*, 95 Ga. 182; *Myers* v. *Phillips*, 197 Ga. 536; *Manley* v. *Combs*, 197 Ga. 768, 781–782; *Sisk* v. *State*, 182 Ga. 448, 453; *Berry* v. *Brunson*, 166 Ga. 523, 531–533; *Polk* v. *State*, 18 Ga. App. 326; *Watkins* v. *State*, 19 Ga. App. 234. The legislature has removed some of the exceptions retained in the 1866 Act. See Ga. Laws 1935, p. 120, allowing parties to testify in breach-of-promise actions. In 1957 the legislature removed the incompetency of a wife to testify for or against her husband. Ga. Laws 1957, p. 53, § 38–1604. Ga. Code § 38–101 sums up this policy: "The object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence."

Moreover, in the case of defendants jointly tried, Georgia allows one codefendant to testify as a sworn witness for the other, although his testimony may serve to acquit himself if believed. See, *e. g.*, *Staten* v. *State*, 140 Ga. 110; *Cofer* v. *State*, 163 Ga. 878. It may even be error in such a situation for the court to treat such testimony as if it were an unsworn statement and to fail to give sufficient emphasis in the charge to the jury as to its effect as evidence. *Staten* v. *State*, *supra*; *Burnsed* v. *State*, 14 Ga. App. 832; *Roberson* v. *State*, 14 Ga. App. 557; cf. *O'Berry* v. *State*, 153 Ga. 880. And a defendant is allowed to give sworn testimony as to matters in his trial not going to the issue of his guilt. See *Thomas* v. *State*, 81 Ga. App. 59.

The treatment accorded the unsworn statement in the Georgia courts increases this peril for the accused. The words of Cooley, J., in his opinion for the Michigan Supreme Court in *Annis* v. *People*, 13 Mich. 511, 519–520, fit his predicament.

> "But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel, and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion be to make, what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed. An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." [19]

We therefore hold that, in effectuating the provisions of § 38–415, Georgia, consistently with the Fourteenth Amendment could not, in the context of § 38–416, deny

[19] There the Michigan Supreme Court reversed a conviction because the trial judge refused to let counsel remind the defendant that he had omitted a material fact from his unsworn statement. The quoted excerpt immediately follows an observation that the Michigan statute permitting an unsworn statement evidently did not contemplate an ordinary direct examination.

appellant the right to have his counsel question him to elicit his statement. We decide no more than this. Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel. For otherwise, in Georgia, "the right to be heard by counsel would be of little worth." *Chandler* v. *Fretag*, 348 U. S. 3, 10.

The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

APPENDIX.

Ala. Code, 1940, Tit. 15, § 305.
Alaska Comp. Laws Ann., 1949, § 66–13–53.
Ariz. Rev. Stat. Ann., 1956, § 44–2704.
Ark. Stat., 1947, § 43–2016.
Cal. Pen. Code § 1323.5. See also Cal. Pen. Code § 1323; Cal. Const., Art. I, § 13.
Colo. Rev. Stat. Ann., 1953, § 39–7–15.
Conn. Gen. Stat., 1958, § 54–84.
Del. Code Ann., 1953, Tit. 11, § 3501.
Fla. Stat., 1955, § 918.09.
Hawaii Rev. Laws, 1955, § 22–15.
Idaho Code Ann., 1948, § 19–3003.
Ill. Rev. Stat., 1955, c. 38, § 734.
Ind. Ann. Stat., 1956, § 9–1603.
Iowa Code, 1958, § 781.12. See also Iowa Code § 781.13.
Kan. Gen. Stat. Ann., 1949, § 62–1420.
Ky. Rev. Stat., 1960, § 455.090.
La. Rev. Stat., 1950, § 15.461. See also La. Rev. Stat. § 15.462.
Me. Rev. Stat. Ann., 1954, c. 148, § 22.
Md. Ann. Code, 1957, Art. 35, § 4.
Mass. Gen. Laws, 1932, c. 233, § 20.
Mich. Comp. Laws, 1948, § 617.64.
Minn. Stat., 1953, § 611.11.
Miss. Code Ann., 1942, § 1691.
Mo. Rev. Stat., 1949, § 546.260. See also Mo. Rev. Stat. § 546.270.
Mont. Rev. Codes Ann., 1947, § 94–8803.
Neb. Rev. Stat., 1956, § 29–2011.
Nev. Rev. Stat., 1957, § 175.170. See also Nev. Rev. Stat. § 175.175.
N. H. Rev. Stat. Ann., 1955, § 516.31. See also N. H. Rev. Stat. Ann. § 516.32.
N. J. Rev. Stat., 1951, § 2A:81–8.
N. M. Stat. Ann., 1953, § 41–12–19.

N. Y. Code Crim. Proc. § 393.
N. C. Gen. Stat., 1953, § 8–54.
N. D. Rev. Code, 1943, § 29–2111.
Ohio Rev. Code Ann., 1953, § 2945.43.
Okla. Stat., 1951, Tit. 22, § 701.
Ore. Rev. Stat., 1953, § 139.310.
Pa. Stat., 1936, Tit. 19, § 681. See also Pa. Stat., Tit. 19, § 631.
R. I. Gen. Laws Ann., 1956, § 12–17–9.
S. C. Code, 1952, § 26–405.
S. D. Code, 1939, § 34.3633.
Tenn. Code Ann., 1955, § 40–2402. See also Tenn. Code Ann. § 40–2403.
Tex. Code Crim. Proc., 1948, Art. 710.
Utah Code Ann., 1953, § 77–44–5.
Vt. Stat. Ann., 1959, § 13–6601.
Va. Code Ann., 1950, § 19.1–264.
Wash. Rev. Code, 1951, § 10.52.040.
W. Va. Code Ann., 1955, § 5731.
Wis. Stat., 1959, § 325.13.
Wyo. Stat., 1957, § 7–244.

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1960.

Billy Ferguson, Appellant, v. Georgia.	On Appeal From the Supreme Court of the State of Georgia.

[March 27, 1961.]

Mr. Justice Frankfurter's separate opinion for reversing the conviction, in which Mr. Justice Clark joins.

Georgia in 1784 adopted the common law of England, Act of February 25, 1784, Prince's Digest 570 (1837). This adoption included its rules of competency for witnesses, whereby an accused was precluded from being a witness in his own behalf. It is doubtful whether and to what extent the common-law privilege of an accused, barred as a witness, to address the jury prevailed in Georgia, but it is a fair guess that the practice was far less than uniform. See *Roberts* v. *State*, 189 Ga. 36, 41. While the common-law rigors of incompetency were alleviated by an enactment of 1866 because "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law," * Georgia retained the incompetency of an accused to testify in his own defense. In 1868, for the first time a statutory provision granted the accused the privilege of making an unsworn statement to the jury. Ga. Laws 1868, p. 24. The sum of all this legislative history is that the defendant in a criminal prosecution in Georgia was disqualified as a witness, but was given opportunity to say his say to the jury. These two aspects of the legal situation in which Georgia placed the accused were made consecutive sections of the criminal code in 1895, Ga. Code, 1895,

*Ga. Laws 1866, p. 138.

§§ 1010, 1011, and have thus remained through their present form as §§ 38–415 and 38–416.

(1) It would seem to be impossible, because essentially meaningless as a matter of reason, to consider the constitutional validity of § 38–415 without impliedly incorporating the Georgia law which renders the defendant incompetent to present testimony in his own behalf under oath. This is not a right-to-counsel case. As the Georgia Supreme Court correctly stated: "The constitutional provisions . . . confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure is not a denial of the benefit . . . of counsel." 215 Ga. 117, 119. What is in controversy here is the adequacy of an inextricably unified scheme of Georgia criminal procedure. The right to make an unsworn statement, provided by § 38–415, is an attempt to ameliorate the harsh consequences of the incompetency rule of the section following. Standing alone, § 38–415 raises no constitutional difficulty. Only when considered in the context of the incompetency provision does it take on meaning. If Georgia may constitutionally altogether bar an accused from establishing his innocence as a witness, it goes beyond its constitutional duty if it allows him to make a speech to the jury whether or not aided by counsel. Alternatively, if § 38–416 is unconstitutional—a legal nullity—a Georgia accused can insist on being sworn as a competent witness, and the privilege also to make an unsworn statement without benefit of counsel would constitute an additional benefit of which he may or may not choose to avail himself. If, as is the truth, § 38–415 has meaning only when applied in the context of § 38–416's rule of incompetency, surely we are not so imprisoned by any formal rule governing our reviewing power that we cannot consider the two parts of a disseverable, single whole because petitioner has not

asked us in terms to review both halves. It is formalism run riot to find that the division into two separate sections of what is organically inseparable may not for reviewing purpose be treated as a single, appealable unit. This Court, of course, determines the scope of its reviewing power over a state court judgment.

(2) But if limitations on our power to review prevent us from considering and ruling upon the constitutionality of the application of Georgia's incompetency law—which alone creates the significant constitutional issue—then I should think that what is left of this mutilation should be dismissed for want of a substantial federal question. Considered *in vacuo*, § 38–415 fails, as has been pointed out, to present any reasonable doubts as to its constitutionality, for it provides only an additional right. If appellant had in fact purposefully chosen not to be a witness, had agreed to the validity of the incompetency provisions, and had intentionally limited his attack to § 38–415 as applied, he would be presenting an issue so abstract that the Court would not, I believe, entertain it.

Perhaps the accused failed to offer himself as a witness because he thought it would be a futile endeavor under settled Georgia law, while the opportunity to have the aid of counsel in making an unsworn statement pursuant to § 38–415 would be a discretionary matter for Georgia judges. Since I cannot assume that appellant purposefully intended to waive his constitutional claim concerning his incompetency—though he may not explicitly have asserted this claim—I have no difficulty in moving from the Court's oblique recognition of the relevance to this controversy of § 38–416 to the candid determination that that section is unconstitutional.

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1960.

Billy Ferguson, Appellant, v. Georgia.	On Appeal From the Supreme Court of the State of Georgia.

[March 27, 1961.]

Mr. Justice Clark, whom Mr. Justice Frankfurter joins, concurring.

Because, as applied by the Georgia court, § 38–415 grants criminal defendants the opportunity to make unsworn statements in their own behalf, but withholds from the same defendants the assistance of their counsel in eliciting perhaps more effective statements, the Court today strikes down that section. It is held to be unconstitutional "in the context of § 38–416" which renders criminal defendants incompetent as witnesses at their own trials. The Court does not, however, treat § 38–416 as anything more substantial than *"context,"* and, while rendering its validity doubtful, fails to pass upon its constitutionality. The Court's hesitancy to reach that question appears to be due to appellant's tactic, at the trial, of offering his statement under § 38–415 and, in so doing, demanding the aid of his counsel, but not offering himself as a competent witness or challenging his exclusion under § 38–416. This has proven to be a perfect cast of apellant's line, for the Court has risen to the bait exactly as anticipated. The resulting advantage of the Court's present holding to the criminal defendant in Georgia is obvious—as matters now stand, the defendant may make an unsworn statement as articulate and convincing as the aid of counsel can evoke, but the prosecution may not cross-examine.

It is true that merely to defeat such a result is insufficient justification for this Court to reach out and decide

additional constitutional questions otherwise avoidable. Nevertheless, the problem appellant poses under § 38–415 is so historically and conceptually intertwisted with the rule of § 38–416 that not only must they be considered together, as the Court expressly recognizes, but they must be allowed to stand or fall together, as a single unitary concept, uncircumscribed by the accident of divisive codification. The section today struck down, § 38–415, is not even intelligible except in terms of the incompetency imposed by § 38–416.* Were the latter rule not codified, its proscription would have to be understood as § 38–415's operative premise of common law disability. The purported boon of § 38–415 was founded on that disability, against the hardships of which, nowhere else presently imposed, it was intended to at least partially relieve. I would not withhold adjudication because of the fact of codification, nor merely on account of the procedural dodge resorted to by counsel.

Reaching the basic issue of incompetency, as I feel one must, I do not hesitate to state that in my view § 38–416 does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall as surely as does it palliative, § 38–415. Until such time as criminal defendants are granted competency by the legislature, the void created by rejection of the codified common-law rule of Georgia may be filled by state trial judges who would have to recognize, as secured by the Fourteenth Amendment, the right of a criminal defendant to choose between silence and testifying in his own behalf. In the same manner the state courts presently implement other federal rights secured to the accused;

*I agree with my Brother FRANKFURTER that if § 38–415 is to be isolated from the incompetency provision of § 38–416, "what is left of this mutilation should be dismissed for want of a substantial federal question."

and therefore the fact that a void of local policy would be created is not an insuperable obstacle to the disposition I propose. Nor would past convictions be automatically rendered subject to fatal constitutional attack unless, as was, in my view, done here, the proper challenge had been preserved by appropriate objection to active operation of the concept embodied in the incompetency rule in either of its phases. In view of the certain fact that criminal prosecutions will continue to be had in Georgia, and that some defendant, if not appellant himself at his new trial, will demand the right to testify in his own behalf, in strict compliance with the procedural standard adhered to today, we will sooner or later have the question of the validity of § 38–416 back on our doorstep. The result, predictably, will be the same as that reached under § 38–415 today. If that proves in fact to be the Court's future disposition of the claim I anticipate, the stability of interim convictions may well be jeopardized where related constitutional claims are preserved but, perhaps, not pressed. So too, on the reverse side of the coin, there may well be interim convictions where, had defendants been permitted to testify under oath in their own behalf, verdicts of acquittal would have been returned. This Court should not allow the administration of criminal justice to be thus frustrated or unreasonably delayed by such a fragmentation of the critical issue through procedural niceties made solely in the hope of avoiding a controlling decision on a question of the first magnitude.

For these reasons I deem it impractical as well as unwise to withhold for a future date a decision by the Court on the constitutionality of § 38–416.

Disagreeing with the distorted way by which the Court reverses the judgment, I join in its reversal only on the grounds stated here and in the opinion of my Brother FRANKFURTER which I join.